FILED
JUL 19 2006
OFFICE OF THE CLERK
SUPREME COURT

No. 05-595

In the Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition for a Writ of Certiorari filed November 7, 2005
Petition for Writ of Certiorari granted May 15, 2006

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RELEVANT DOCKET ENTRIES

U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

02-15866

10/16/02 Filed Order (Ferdinand F. FERNANDEZ, Susan P. GRABER,) The mtn to broaden the COA is GRANTED.....(Pls see order for complete text) Aplt's mtn for appointment of csl is GRANTED. Csl will be appt'd by separate order. The Clk shall serve a copy of this order on Colleen Rosenkrantz, CJA Designee, USDC, District of NV, 400 S. Virginia St, Ste 301, Reno, NV 89501, who will locate appt'd csl. The DC shall provide the Clk of this ct with the name and address of appt'd csl within 14 days of locating csl. The briefing schedule is set as follows: Aplt's opening brf is due 12/13/02; aple's ans brf is due 1/17/03; and the optional reply brf is due within 14 days after svc of the ans brf. All remaining outstanding mtns are denied. [02-15866] (af)

3/24/03 Filed Original and 15 copies Appellant Marvin Howard Bockting opening brief (Informal: no) 39 pages and five excerpts of record in 2 volumes; served on 3/21/03. [02-15866] (af)

5/7/03 Filed Original and 15 copies appellee Robert Bayer's 42 pages brief, 5 Sup Excertps of Record in 1 vol; served on 5/5/03. [02-15866] (af)

6/9/03 Filed Original and 15 copies Marvin Howard Bockting reply brief (Informal: no) 15 pages; served on 6/5/03. [02-15866] (af)

1/14/04 ARGUED AND SUBMITTED TO J. C. WALLACE, John T. NOONAN, M. M. McKEOWN [02-15866] (gva)

4/1/04 Filed Order (J. C. WALLACE, John T. NOONAN, M. M. McKEOWN,) The parties are directed to file, within twenty-eight (28) days from the date of this order, simultaneous brfs of not more than twenty (20) pages responding to the following questions: (1) Should this ct apply Crawford's new constitutional rule retroactively to Bockting's collateral proceedings? (cite) (2) Which, if any, of the hearsay accusations admitted at trial are admissible under Crawford? (3) Assuming a Confrontation Clause violation occurred, should this ct consider the error harmless and affirm the denial of petition? (4) Should the petition be remanded to state ct for reconsideration in light of Crawford? (served to PANEL; phoned and faxed to all parties) [02-15866] (af)

4/29/04 Filed Original and 15 copies Aplt Marvin Howard Bockting supp brief of 14 pages, served on 4/28/04. (Fedex to PANEL) [02-15866] (af)

5/3/04 Filed Original and 15 copies Aple Robert Bayer supplemental brief of 16 pages, served on 4/29/04. (Fedex to PANEL) [02-15866] (af)

2/22/05 FILED (VOLUME 1 & 2) OPINION: Bockting's petition for a writ of habeas corpus is GRANTED. (Terminated on the Merits after Oral Hearing; Granted; Written, Signed, Published. J. C. WALLACE, partial concurrencing and partial dissenting; John T. NOONAN, concurring; M. M. McKEOWN, author.) FILED AND ENTERED JUDGMENT. [02-15866] (af)

3/3/05 Filed Original and 50 copies Aple Robert Bayer petition for panel rehearing and petition for rehearing en banc in 20 pgs; served on 3/2/05. (total of 4,188 words) (PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES) [02-15866] (af)

4/14/05 Filed Aplt Marvin Howard Bockting's opposition to aple's petition for rehearing and suggestion for rehearing en banc; served on 4/13/05. (PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES) [02-15866] (af)

6/1/05 Filed (IN 2 VOLS) order and amended opinion (Judges J. C.WALLACE, concurring in part and dissenting in part, John T. NOONAN, concurring, M. M. McKEOWN, author) (Orig. opinion id: [5337347-1]) The opinion filed Feb 22, 2005, (cite), is amended as follows: (Pls see opinion for complete text) The petition for panel rehearing is DENIED. THE PETITION FOR REHEARING EN BANC IS PENDING BEFORE THE COURT. NO FURTHER PETITIONS MAY BE FILED. Bockting's petition for a writ of habeas corpus is GRANTED. [02-15866] (af)

8/11/05	Filed order (J. C. WALLACE, John T. NOONAN, M. M. McKEOWN,): The pet for rhrg en banc is DENIED. (See order for complete text) [02-15866] (mhf)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA (RENO)

CASE # 3:98-cv-00764-ECR-VPC

Date Filed #	Docket Text
04/06/1999	7 PETITION FOR WRIT OF HABEAS CORPUS obo P (Entered: 02/10/2003)
07/09/1999	13 MOTION TO DISMISS petition w/h/c obo Rs. (m) (Entered: 02/10/2003)
07/09/1999	12 ORDER Rs mtn (#11) granted. Rs sh fl rspn/anser by 7/12/99. mld 7/9/99 (Entered: 02/10/2003)
08/26/1999	16 RESPONSE IN OPPOSITION TO MOTION to mtn to dism pet w/h/c (#13) obo P. (m) (Entered: 02/10/2003)
10/12/1999	17 ORDER Rs mtn to dism (#13) is granted. CLk sh snd P a 2254 w/instrc. P has 30 day frm dt ord enterd to fl amnd petn. See ord for spfcs. EOD 10/13/99. mld 10/13/99 (Entered: 02/10/2003)
10/29/1999	18 NOTICE OF APPEAL as to ord (#17) obo P. (no fees pd) (m) (Entered: 02/10/2003)
11/03/1999	20 ORDER P has fld a ntc of appl wh will be trated as a mtn for cert of appealability. Said mtn is denied. (See ord for spfcs) mld 11/4/99 (Entered: 02/10/2003)

11/16/1999	24	ORDER mtn to vol w/d ntc of appl (#23) is granted. Mtn for enlargment (#22) is granted. P hv til 12/12/99 to fl amnd pet. mld 11/16/99 (Entered: 02/10/2003)
12/06/1999	25	PETITION FOR WRIT OF HABEAS CORPUS obo P (Entered: 02/10/2003)
03/13/2000	29	ANSWER TO COMPLAINT to 1st amnd pet (#25) obo Rs. (Entered: 02/10/2003)
05/17/2000	35	PETITION FOR WRIT OF HABEAS CORPUS 2d obo P (Entered: 02/10/2003)
04/30/2001	37	MOTION TO DISMISS 2nd amended petn for W/H/C (#35) obo Rs. (m) (Entered: 02/10/2003)
06/13/2001	40	RESPONSE TO MOTION to Rs mtn to dism 2nd amended petn for W/H/C (#37) obo P. (m) (Entered: 02/10/2003)
01/14/2002	41	ORDER Rs mtn to dism (#37) is granted. P shl hv 14 days to inform Crt by declaratn tht he wishes to either (1) formally abandon the 2 unexhausted 6th amendmnt clms & proceed only on the remaining fully exhausted clms or (2) vol dism entire petn. Rs shl hv (Entered: 02/10/2003)
02/13/2002	43	ANSWER TO COMPLAINT to 2nd amended petn (#35) obo Rs. (m) (Entered: 02/10/2003)

03/19/2002	45	ORDER tht petner's 2nd am petn for writ of H/C (#35) is denied. The Clerk shl enter jdgmnt in Rs' fav & agnst the petner. (Entered: 02/10/2003)
03/21/2002	46	JUDGMENT entered in fav of Rs & agnst petner. (Entered: 02/10/2003)
04/24/2002	47	NOTICE OF APPEAL as to ord (#45) obo P. (m) [No fees paid] (Entered: 02/10/2003)

JUSTICE COURT
LAS VEGAS TOWNSHIP
COUNTY OF CLARK
STATE OF NEVADA
PRELIMINARY HEARING

March 30, 1998

* * *

[p.28]

name?

THE WITNESS: B-o-c-k-k -

THE COURT: We have the spelling, continue on.

DIRECT EXAMINATION

BY MR. LUKENS:

Q. Hi, Autumn.

A. Hi.

Q. Do you remember me?

A. Yes.

Q. Do you remember we talked yesterday?

A. Yes.

Q. And do you remember one of the things we talked about was telling the truth and difference between the truth and a lie?

A. Yes.

Q. And that you know what the truth is, right?

A. Yes.

Q. And you know what a lie is?

A. Yes.

Q. If I held this pencil up and then I put the pencil behind my back and said, "I have a blue pencil behind my back," would that be the truth or a [p. 29] lie?

A. A lie.

Q. Okay. If I said, "I have a red pen behind my back," would that be the truth or would that be a lie?

A. A truth.

Q. Now, you know when you raised your hand and you promised to tell the truth, that that's what you have to tell the judge the truth, right?

A. Yes.

Q. Do you see your mommy present in court today?

A. Yes.

Q. Is your mommy here?

A. Yes.

Q. Would you point to her and just say what she's got on?

A. She's wearing a yellow shirt.

Q. And do you see your daddy present in court today?

A. Yes.

Q. And where is he?

A. (Witness pointing.)

Q. Could you say what he has on?

A. (No response.)

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Q. What color is his shirt?

A. (No response.)

Q. Is it a white shirt?

A. Yes.

Q. And he's seated next to the fellow in the blue suit with the coat and tie?

A. Yes.

MR. LUKENS: Your Honor, may the record reflect she's identified the defendant.

THE COURT: So reflect.

BY MR. LUKENS:

Q. Do you call him daddy or J.R.?

A. J.R.

Q. Do you remember where you lived before you lived in Las Vegas?

A. Delta.

Q. Where is that, in Colorado?

A. Yes.

Q. Do you remember moving to Las Vegas?

A. Yes.

Q. When you came here, what school did you go to?

A. I don't remember.

Q. Do you remember what grade you're in?

A. Kindergarten.

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Q. And you get good grades, don't you?

A. Yes.

Q. What do you get what you get good grades?

A. Star.

Q. Didn't you have a star the other day? You showed me your star.

A. Yeah.

Q. Now, do you know what your mommy does? Does your mommy go to school?

A. Yes.

Q. And when mommy goes to school, who takes care of you?

A. Susie.

Q. Okay. Does anybody else besides Susie take care of you?

A. Her husband Daniel and her boy Brian.

Q. Sometimes does your daddy take care of you?

A. No.

Q. Do you ever stay with your daddy while your mom goes to school?

A. No.

Q. Ever?

A. Huh-uh.

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Q. Do you know what time of day your mommy goes to school? Does she go during the daylight hours or during the nighttime hours?

A. She goes in the morning.

Q. Oh, in the morning?

A. (Witness nods head.)

Q. Does your daddy ever baby-sit for you?

A. No.

Q. How many people are in your family?

A. Three. Two.

Q. Two?

A. (Witness nods head.)

Q. Who is in your family?

A. My little sister Honesty.

Q. And who else?

A. My mom.

Q. How about you? You're there too, aren't you?

A. (Witness nods head.)

Q. Did there ever come a time when your daddy touched you in a way that you didn't think he was supposed to touch you?

A. Yes.

MR. BLASKEY: Object. It's a little vague, your Honor. A spanking is a way in which –

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MR. LUKENS: Your Honor, I'm entitled great latitude with the witness like this, and I'm certainly entitled – I don't think counsel expects me to make my case with that statement alone.

THE COURT: Continue on.

BY MR. LUKENS:

Q. Now, you said that there was a time when your daddy touched you that you didn't think he ought to touch you like that; is that right?

A. Yes.

Q. Do you remember when that was?

A. A long time ago.

Q. Do you remember, was your mommy there? Was your mommy there?

A. No.

Q. How about Honesty, was Honesty there?

A. Yes.

Q. Where was Honesty, in the same room with you?

A. No.

Q. Where was Honesty?

A. She was in the living room.

Q. And what room were you in?

A. In the bathroom.

Q. What happened when you were in the [p.34] bathroom?

A. (No response.)

Q. Do you remember whether or not you had any clothes on?

A. Yes.

Q. Did you have your clothes on?

A. Yes.

Q. Did there come a time when your daddy took your clothes off?

A. Yes.

Q. Did he take all your clothes off?

A. No.

Q. What part of your clothes did he leave on? Did he leave on your top?

A. Pants.

Q. He left on your pants?

A. (Witness nods head.)

Q. Did he ever take your pants down?

A. Huh-uh.

Q. He left them on the whole time?

A. (Witness nods head.)

Q. How did your daddy touch you?

A. I don't remember.

Q. Do you remember telling your mommy about it?

[p.35]

A. Yes.

Q. Do you remember telling a fellow named Chuck about it?

A. Yes.

Q. When you told them about it, did you remember then?

A. No.

Q. You remember telling them, don't you?

A. Yes.

Q. Do you remember what it was that you told them?

A. No.

Q. Do you remember going to the doctor sometime?

A. Yes.

Q. And do you remember, was the doctor a nice fellow?

A. Yes.

Q. And do you remember what the doctor did?

A. No.

Q. How long ago was that that you went to the doctor?

A. It was a couple of days ago.

Q. Did you go to the doctor a short time after your daddy had touched you?

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A. I don't know.

Q. Do you know what your pee-pee is?

It's okay, Autumn.

THE COURT: Why don't you come up here and console her, will you?

MR. LUKENS: Your Honor, at this time, for purposes of preliminary hearing only, I'm going to ask that the Court declare the witness unavailable to testify for obvious reasons.

THE COURT: Just a minute. I'm going to have you, at this time, sit in the chair right next to her.

Autumn, honey, let me explain something to you. Okay? Your mommy is going to be sitting right there, right next to you. Okay? No one is going to hurt you. No one is going to hurt you, I promise you that. Do you understand that?

THE WITNESS: (Witness nods head.)

THE COURT: All we want and all I want is just for you to tell me the truth. Now, I know it may be hard, but it's necessary that you tell the truth.

Just tell me what happened and then after you tell me what happened, then you can go with your mommy and leave. Okay?

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MRS. BOCKTING: The sooner you do it, the sooner we can go. Okay? Mom's right here.

THE COURT: You're a big girl. You're in school.

MRS. BOCKTING: Just answer the questions like Chuck asked you. Do you remember how you told Chuck everything? Just tell the truth. Okay? Mom's right here. I'll hold your hand. It's okay.

Crying's not going to do no good. Do you want to go? We have to get this over with. Do you want to go? We're going to be here all day. Just answer his questions. Just tell the truth only.

THE COURT: Will you do that, Autumn?

MRS. BOCKTING: Answer him.

THE WITNESS: I'll try.

THE COURT: Why don't you lift your head up now. Lift your head up. Do you see the man right in front of you here? Do you see this man right here? Now, he's going to ask you a few more questions, so please answer them.

BY MR. LUKENS:

Q. Autumn, do you remember when you were in the bathroom with your dad?

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A. No.

Q. Do you remember when you talked to Chuck?

A. Yes.

Q. And do you remember you were able to tell Chuck that some things happened to you. Do you remember telling Chuck about those things?

A. Uh-huh.

Q. You remember that?

A. Yes.

Q. And Chuck's a nice fellow, isn't he?

A. Yes.

Q. Did you tell Chuck something about your daddy?

A. I don't remember.

Q. Do you remember telling your mom something about your daddy?

A. No.

Q. Do you remember your daddy ever saying anything to you that something bad would happen to you if you told?

A. No.

MR. LUKENS: Your Honor, I'm going to ask – well, the witness is obviously unavailable to testify this morning. I'm going to ask she been [p.39] excused and we will call Detective Zinovitch.

THE COURT: You won't answer the questions, Autumn? Autumn, let me ask you this, honey, are you afraid that if you tell the truth that your daddy will hurt you?

THE WITNESS: No.

THE COURT: Because there's no use being afraid of that. Why don't you want to answer the questions, Autumn?

THE WITNESS: I don't remember some of them.

MRS. BOCKTING: It's okay to talk about it. You know you can talk about anything you want. Why don't you just tell them what you told mommy happened, what you told Chuck?

MR. BLASKEY: Your Honor, I would rather not have the mother —

MRS. BOCKTING: Just be honest like when you told mommy and when you told Chuck, that's all you got to say. Just tell the truth.

THE WITNESS: You already told them.

MRS. BOCKTING: I know I already told them but they can't take my word for it, you have to tell them what happened. You have to be the one to tell them. They want to hear it from you.

[p.40]

Would you do that for mommy, please? Will you answer his questions?

THE WITNESS: I'll try.

THE COURT: We'll try one more time. Autumn, listen very carefully now to this man right here. He's going to ask you a few more questions. Please answer just you like you told your mommy and told Chuck. Okay?

THE WITNESS: (Witness nods head.)

BY MR. LUKENS:

Q. Do you remember what it was that you told your mommy?

A. No.

THE COURT: I'll declare her unavailable as a witness.

MR. LUKENS: Okay, Autumn, you can get down. That's okay.

Detective Zinovitch will be my next witness.

CHARLES ZINOVITCH,

having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. State your full name and spell your last name.

THE WITNESS: Charles Zinovitch. Z, as

* * *

EIGHTH JUDICIAL DISTRICT
COUNTY OF CLARK
STATE OF NEVADA
TRIAL TRANSCRIPT EXCERPTS
AUGUST 15, 1988-NOVEMBER 1, 1988

* * *

[p.13]

THE COURT: Very good. And the two young ladies we have, are they potential witnesses?

MR. LUKENS: No, Your Honor, they are not.

THE COURT: Mr. Lukens, you wish to give your opening remarks?

(Opening statements were had.)

THE COURT: Very good then. Mr. Lukens, your first witness.

MR. LUKENS: Autumn Bockting.

THE COURT: Mr. Bailiff, before you do, could counsel approach the bench, please. Mr. Bailiff, you could remove the lectern for us.

(Discussion at the bench which was not reported.)

MR. LUKENS: Your Honor, may I ask permission to examine Autumn from closer instead of from here?

THE COURT: Yes.

MR. LUKENS: Your Honor, may we take a short recess?

THE COURT: Yes.

(The admonition was read.)

THE COURT: The Court's in recess.

(Recess taken.)

THE COURT: How are you doing, Autumn? Autumn, you okay? All right. Continuation of case C83110, State of Nevada versus Marvin Howard Bockting. The record will [P.14] reflect the presence of defendant; his counsel, Mr. Blaskey; Mr. Lukens representing the State, the absence of the jury. And we have on the stand Autumn Jean Tresler Bockting.

All right. Go ahead, counsel.

MR. LUKENS: Autumn, this is when you have to stand up to be sworn.

THE COURT: Can you stand up, Autumn? Can you stand up raise your hand for me? Autumn, stand up now and raise your hand for us, okay.

MR. LUKENS: Your Honor, I think under these conditions, I think that the witness is unable to testify.

THE COURT: Well, I think it is apparent without the jury if we can't get anything more than this, it is not likely when the jury is here we will do any better. Go ahead and assist, will you please.

Counsel approach the bench, please.

(Discussion at the bench which was not reported.)

MR. LUKENS: Your Honor, at this time since the Court has observed for itself the inability of Autumn Bockting to testify due to the emotional conflict that goes on within her, the State intends pursuant to NRS 51.385 to offer into evidence the statements made by Autumn Bockting to both her mother, Laura, and Detective Zinovitch and, to a more limited extent, Diane Donovan.

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This offer is made pursuant to 51.385 which states in pertinent part that, "In addition to any other provision for admissibility, a statement made by a child under the age of 10 years, describing any act of sexual conduct performed with or on the child, is admissible in a criminal proceeding regarding that sexual conduct if, A, the Court finds in hearing outside the presence of the jury that the time, content and circumstances of the statement provides sufficient circumstantial guarantees of trustworthiness, and, B, the child "testifies at the proceeding or is unavailable or unable to testify." I submit that portion B has been met.

And, in addition, under Subsection 2, it says, "If the child is unavailable or unable to testify, written notice must be given to the defendant 10 days before the trial if the prosecution intends to offer the statements in evidence."

I would submit that the State has complied with that and that such notice was filed on August 2nd, 1988 and is styled Notice Pursuant to NRS 51.385 wherein I gave notice

of the three individuals who I intend to call as to Autumn's statements.

THE COURT: Very well. Mr. Blaskey.

MR. BLASKEY: Thank you, Your Honor. I will be objecting to this testimony at this time. I would like leave of the Court to file in open court points and authorities in opposition to this testimony being presented.

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THE COURT: Have you a copy for counsel?

MR. BLASKEY: Yes, I do have one. I will hand it to him at this time.

THE COURT: Court will allow you to file that document.

MR. BLASKEY: Your Honor, I have two major objections to this testimony. I will just point them out to Your Honor at this time, just the issues involved.

One is that since the daughter, Autumn, is not testifying, that under the new Supreme Court decision of Coy versus Iowa allowing this hearsay testimony would be a violation of the confrontation clause of the sixth amendment.

And, also, we would submit at the end of the hearing that the testimony is unreliable due to Autumn's previous testimony at the preliminary hearing, but I will save that argument until after the testimony has been presented for you to hear.

THE COURT: Very good then. Mr. Lukens, your first witness then outside the presence of the jury?

MR. LUKENS: Will be the child's mother, Laura Bockting.

Your Honor, I am only going into the circumstances surrounding the statement of when disclosure was made for the purposes of the hearing.

THE COURT: I think it might be well that we are

* * *

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RECROSS-EXAMINATION

BY MR. BLASKEY:

Q. Were you actually present when he made that statement?

A. Yes, I was.

MR. BLASKEY: Thank you. No further questions.

THE COURT: All right. Thank you very much. You are excused. Next witness.

MR. LUKENS: I can't see because of the glare of the lights. May I ask if the Court intends to go on past five?

THE COURT: No.

MR. LUKENS: Diane Donovan.

THE COURT: Very good.

DIANE DONOVAN,

was called as a witness on behalf of the State and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LUKENS:

Q. Would you state your name, please?

A. I don't know if I can talk. Diane Donovan.

Q. And what is your business address, Mrs. Donovan?

A. 526 South Seventh Street.

Q. And what business is that at, that address?

[p.55]

A. Center for Interpersonal Studies.

Q. How are you employed?

A. I am a self-employed marriage and family therapist.

Q. Did you have to go to school to become a marriage and family therapist?

A. Yes.

Q. And where did you go to undergraduate school?

A. UNLV?

Q. And when did you graduate from undergraduate school at UNLV?

A. 1983.

Q. And what was your degree in?

A. Sociology.

Q. And after you attained -- that is a bachelor's degree?

A. Yes, sir.

Q. After you attained your bachelor's degree in sociology, did you continue with your education?

A. Yes, I did.

Q. And in what area did you continue on with your education?

A. Marriage and family therapy.

Q. And did you obtain a degree in that?

A. Yes, I did.

Q. What degree did you obtain in that?

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A. Masters degree.

Q. And so when did you obtain your masters degree in that?

A. 1985.

Q. In connection with being a marriage and family counselor, do you ever counsel the victims of sexual abuse or child sexual abuse?

A. Yes, I do. When I was working on my internship, I worked for a year for Parents United running a pre-teens group for them.

Q. What is Parents United?

A. It is a sexual abuse treatment program.

Q. Sponsored by whom, for whom and where is it? Tell us a little bit about it.

A. Not sure who sponsored it. Sara Beards was running it, I believe the families -- it is a self-help group for families. Local therapists come in and volunteer services to run groups.

Q. Geared toward what type of problems?

A. Sexual abuse treatment.

Q. Sexual abuse; intrafamilial sexual abuse?

A. Yes, within families. They have mothers' groups, groups for the victims, groups for the perpetrators and I believe they have some mother-daughter groups and family groups.

[p.57]

Q. So that for more than a year while you were doing your internship, I believe you said that you were connected with this group?

A. Yes.

Q. Now, since you have -- do you have any licenses by the State to do what you do?

A. I am licensed under the marriage and family board, certified marriage and family counselor.

Q. You hold any other licenses, also?

A. Certified substance abuse counselor with the Bureau of Alcohol and Drug Abuse.

Q. What has your experience been since your graduation? Well, let's ask you: Have you consistently worked with victims of sexual abuse and child sexual abuse?

A. Yes. I am on the referral for Rape Crisis and I receive sexual abuse clients where I work in my office. They are usually referred to me.

Q. In that capacity, did you have occasion to meet a little girl named Autumn Bockting?

A. Yes, I did.

Q. Do you remember approximately when it was that you first met Autumn?

A. I believe it was Match.

Q. Of this year?

A. Of this year.

[p.58]

Q. Why did Autumn come in to see you?

A. Autumn was referred in by Rape Crisis under the Victims Assistance Program to receive therapy for sexual abuse treatment along with her mother.

Q. During that period of time of March of 1988, how often did you see Autumn?

A. I saw her once a week for an hour.

Q. When you saw Autumn, was anyone else with her during these meetings?

A. Her mother.

Q. Was her mother present during the entire meeting, for all of the meetings?

A. No.

Q. Describe how these meetings -- what would happen at these meetings?

A. I would talk to Autumn. Autumn and I would play with my stuffed animals or I have some toys we would play with and she would draw pictures for me that I would ask her to draw and then --

Q. Was her mother always present or never present?

A. No. Her mother was not present when I was playing with her. And when her mother would be present, oh, for a few minutes during the beginning of the session and then her mother sometimes I would talk to her alone while Autumn was drawing.

[p.59]

Q. So primarily these were periods of time of interaction between you and Autumn individually; is that correct?

A. Yes.

Q. Now, when Autumn came to see you, you were aware of why Autumn was there; is that right?

A. Yes.

Q. And you were aware of the allegations that had been made against Autumn's stepfather; is that correct?

A Yes.

Q. Do you have an opinion as to whether or not Autumn's behavior was consistent with having been sexually assaulted?

MR. BLASKEY: I am going to object, Your Honor. That is outside her scope, invading the province of the jury at this time.

MR. LUKENS: If Your Honor wishes me to address this before the jury, there is a specific statute on point that allows someone in this area to state that. And notice I prefaced her behavior, because it also allows mental condition, because that is going to be the next question, to allow the person to testify, the expert to testify, that the victim's mental condition or behavior is consistent with having been sexually assaulted.

THE COURT: All right. Mr. Blaskey, are you familiar with that area of law?

[p.60]

MR. BLASKEY : No, Your Honor. I don't know the exact statute.

THE COURT: Do you happen to have it, Mr. Lukens, so Mr. Blaskey can review it?

MR. LUKENS: NRS 50.345, expert testimony to show victim's behavior or condition is consistent with the behavior, condition of a victim of sexual assault.

THE COURT: Miss Donovan, is it Miss or Mrs.?

THE WITNESS: Miss.

THE COURT: Do you consider yourself expert in this area?

THE WITNESS: More expert than a lay person definitely. I have worked with victims for over two years.

THE COURT: Have you had any form of training in this particular situation?

THE WITNESS: Yes. I have attended continuing education workshops and I took special training during my masters program. And Parents United offers training like an in-service training while we do the therapy. And as an intern, I had two years of training under a supervisor who also worked with these issues.

THE COURT: When you say these issues, are we speaking of young children that have allegedly been abused sexually?

WITNESS: Yes, sexual abuse victims, young [p.61] children through adulthood.

THE COURT: All right. I will allow limited inquiry here.

MR. LUKENS: Thank you.

Q. Mrs. Donovan, I ask you: Do you have an opinion after working with Autumn as to whether or not her behavior is consistent with the behavior of a victim of sexual assault?

A. Yes. I believe her behavior is consistent with a sexual assault victim.

Q. Do you have an opinion as to whether or not her mental condition at the time that you worked with Autumn is consistent with the condition of a victim of sexual assault?

A. Yes.

Q. What is that opinion?

A. I believe that she does have -- could you repeat it? I am sorry.

Q. It was a two-prong question. The first question dealt with her behavior. The next one deals with her mental condition and whether or not that mental condition is consistent with the mental condition of a victim of sexual assault.

A. I believe that Autumn is in denial at this point in time. Her behavior is consistent with denial.

Q. When you say her behavior is consistent with denial, [p.62] what do you mean? What is denial and what do you mean?

A. Denial is like a defense mechanism that the mind is using to help the victim cope with the trauma. Autumn appears not to want to deal with the sexual abuse. She doesn't want to talk about it. She doesn't want to acknowledge that it happened.

She is -- it appears that she is in self-protecting mode of thinking and she -- as long as she's -- as long as she's denying, she doesn't have to feel the trauma that she underwent and that is the way she appears to me.

MR. LUKENS: I have no further questions, Your Honor.

THE COURT: Cross-examination, Mr. Blaskey.

MR. BLASKEY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BLASKEY:

Q. Is it Miss Donovan or Mrs.?

A. Miss.

Q. Miss Donovan, you understand that when Autumn came to see you those were just allegations that were made against her father; isn't that correct?

A. No, sir.

Q. She went to see you because someone referred her to you; is that correct?

[p.63]

A. Yes.

Q. And in reference to you they said she might have been sexually assaulted; is that correct?

A. I don't know. Usually I don't go into that.

Q. Now, you say that her behavior and her mental condition is consistent with someone who has been sexually assaulted; is that correct?

A. Yes.

Q. Now, you did not see any sexual assaults take place between Marvin and Autumn, did you?

A. No, definitely not.

Q. And you never asked Marvin his side of the story about what had happened, did you?

A. No.

Q. And, in fact, you never even talked to him at any point, have you?

A. No.

MR. BLASKEY: I have no further questions.

THE COURT: Redirect.

MR. LUKENS: No redirect, Your Honor.

THE COURT: Miss Donovan, you are excused. Thank you very much. Counsel, I think we might have a brief recess.

MR. LUKENS: My remaining witness for the day is the mother, Laura Bockting.

* * *

SUPREME COURT OF NEVADA

No. 19524

[Filed June 22, 1989]

MARVIN HOWARD BOCKTING,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

ORDER DISMISSING APPEAL

Appellant Marvin Howard Bockting was charged with sexual assault on his six-year-old stepdaughter. During the preliminary hearing and at trial, the victim did not cooperate in answering questions about the assault. Thus, the judge invoked NRS 51.385(1)[1] which permits the child's hearsay

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[1] NRS 51.385(1) provides as follows:

> 1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing the act of sexual conduct performed with or on the child is admissible in a criminal proceedings regarding that sexual conduct if the:
>
> (a) Court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

statements concerning the assault to be admitted into evidence. The victim's mother and a police detective both testified that the victim had told them about Bockting's assault.

Bockting claims that NRS 51.385(1) is unconstitutional because the United States Supreme Court ruled in *Coy v. Iowa*, ___ U.S. ___, 108 S. Ct. 2798 (1988), that the confrontation clause gives the defendant the right to confront witnesses face-to-face. While there are some similarities between *Coy* and the instant case, the procedure used in this case did not violate Bockting's sixth amendment rights.

The Supreme Court's holding in *Coy* is narrow. The Court found that the Iowa statute in question made only a generalized finding -- "a legislatively imposed presumption" -- that not allowing the child victim to see the defendant would be in the best interest of the child. The Court then held that "something more than the type of generalized finding underlying such a statute is needed when the exception is not 'firmly . . . rooted in our jurisprudence.'" *Id.* at 2803 (quoting *Bourjaily v. United States*, 483 U.S. 171, 183 (1987)).

The legislature does not make a "generalized finding" that not having the child victim testify is in the best interest of the child. Instead, the statute provides for a hearing out of the presence of the jury to determine if the hearsay testimony is trustworthy and if the child is unavailable or unable to testify. Only upon making these findings may a court admit into evidence the out-of-court declarations of a child victim. This

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(b) Child either testifies at the proceeding or is unavailable or unable to testify.

procedure specifically comports with the Supreme Court's requirements for admitting hearsay evidence in a criminal proceeding: "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'" *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

The district court in this case found that the victim was unavailable as a witness and found that the hearsay evidence was reliable. Since proper admission of hearsay evidence has long been held not to be a violation of the confrontation clause, we do not agree with Bockting that NRS 51.385(1), allowing admission of out-of-court statements by child victims, is unconstitutional when measured against the confrontation clause of the sixth amendment.

We also conclude that Bockting was not prejudiced by the violation of the rule of exclusion when the court allowed the victim's mother to remain in the courtroom while the victim testified. The record clearly shows that the testimony of the victim's mother was the same before and after she heard what little the victim had to say in the preliminary hearing. *See Givens v. State*, 99 Nev. 50, 657 P.2d 97 (1983).

Having decided that all of Bockting's contentions on appeal lack merit, we

ORDER this appeal dismissed.

/s/ _____
Young, C. J.

/s/ _____
Steffen, J.

/s/ _____
Springer, J.

/s/ _____
Mowbray, J.

/s/ _____
Rose, J.

SUPREME COURT OF THE UNITED STATES

No. 89-5396

[Filed June 28, 1990]

Marving Howard BOCKTING Petitioner	)
v.	)
NEVADA	)

On Petition for Writ of Certiorari
to the Supreme Court of Nevada

JUDGES: Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy.

OPINION

The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Nevada for further consideration in light of *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

SUPREME COURT OF NEVADA

No. 19524

[Filed March 8, 1993]

MARVIN HOWARD BOCKTING,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

Remand from United States Supreme Court after vacating prior order dismissing appeal, ordering further consideration of an appeal from a conviction of three counts of sexual assault on a minor under the age of fourteen years. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Affirmed.

JUDGES: Rose, C.J., Steffen, J., Young, J., Springer, J.

OPINION

PER CURIAM:

Appellant Marvin Howard Bockting was arrested and charged with four counts of sexual assault on his six-year-old stepdaughter: counts I and II, forcing vaginal and anal intercourse upon the child; count III, compelling the victim to perform fellatio upon him; and count IV, forcing the child to

submit to cunnilingus. Bockting was convicted on Counts I, II and III.

Bockting appealed to this court, contending that his constitutional right to confront adverse witnesses had been denied. More specifically, Bockting insisted that he was deprived of his right to cross-examine his stepdaughter because unreliable hearsay statements attributed to her were admitted into evidence pursuant to NRS 51.385. Concluding that Bockting's arguments were meritless, we ordered the appeal dismissed.

Bockting successfully petitioned the United States Supreme Court for a writ of certiorari. After vacating this court's order dismissing appeal, the Supreme Court remanded Bockting's appeal to us for further consideration in light of *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

FACTS

Bockting and the child victim's mother, Laura, were married in early 1984. Eventually the couple, Laura's daughter, and a child born to Bockting and Laura, made their way to Las Vegas, where they obtained one-bedroom accommodations in a hotel. Bockting worked as a handyman at various jobs during the day and took care of the children at night while Laura attended business college.

On Saturday evening, January 16, 1987, while Bockting was away, his stepdaughter woke up frightened and sobbing. Despite prior threats by Bockting that he would "beat her butt" and that "mom would make dad leave," the

stepdaughter eventually told her mother about the sexual attacks she had suffered at the hands of Bockting.[1]

Laura asked her daughter when these activities occurred and the child said it happened a lot and that the last occurrence was while the child's mother was in school. Because the disclosures were made after Laura had been in school for only one week, the last incident must have transpired within that week.

On Tuesday, January 19, 1987, Laura took her daughter to the hospital, where Dr. Stacy Rivers, a gynecologist and obstetrician, examined the child under a general anesthetic. The examination by Dr. Rivers revealed a tear in the rectal sphincter and a wide opening in the hymenal ring.

Detective Charles Zinovitch attempted to question the visibly distraught child at the hospital, but because she was so upset, her only response was that someone had hurt her. Two days later, however, Detective Zinovitch was able to effectively communicate with the victim at his office. There, in a room specially designed to enable children to feel comfortable and at ease while being interviewed, the child gave the detective the same information she had conveyed to her mother. Detective Zinovitch asked the girl various questions to determine the consistency and authenticity of her

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[1] After being reassured by her mother, the young victim explained that Bockting had repeatedly put his "pee-pee in her pee-pee," that he put his "pee-pee in her butt," that he made her "suck his pee-pee like a sucker," and that "he put his chin on her pee-pee."

statements.[2] The child's third recitation of the events occurred when she demonstrated the incidents with the use of anatomically correct dolls. Her depiction of the acts reflected "correct" positioning of the dolls, representing Bockting and herself during the various sexual acts, as well as correct placement of the doll's genitalia.[3] Subsequent to the interview, Bockting was arrested and charged with four counts of sexual assault.

At the preliminary hearing, the prosecutor questioned the child concerning the incidents with Bockting. She was able to describe the surroundings, but stated that her pants were never removed and that she could not remember how Bockting touched her. She testified that she remembered talking to her mother and Detective Zinovitch, but could not remember what she told them. The judge asked Laura to accompany her daughter on the stand in an effort to enable the child to respond to questions. The effort proved futile,

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[2] When asked what was meant by her "pee-pee," the child responded by pointing between her legs. Similarly, when asked where a man's "pee-pee" was, she said it was between his legs. When discussing in child's terms the subject of fellatio, she descriptively stated that "white bubbly stuff came out of Bockting's pee-pee" and went into her mouth.

[3] Near the outset of the interview, Detective Zinovitch told the child that he might show her some dolls, but made no mention of the nature of the dolls. After the child had been able to describe to the detective what had happened to her, and the detective had thus heard all that he felt was necessary for a complete interview, the child asked if she could then see the dolls. In response, the detective produced the anatomically correct dolls, and the child was able to select the adult male doll and the "little girl" doll, and thereafter demonstrate to the detective through use of the two dolls what Bockting had done to her.

however, and the judge declared the child unavailable as a witness.

At trial, a hearing was held outside the presence of the jury where the six-year-old child was called to the stand and was uncommunicative when requested to take the oath. Efforts to persuade her to cooperate were of no avail and the judge, at the request of the prosecutor, declared the child unavailable for purposes of testifying. The prosecutor then attempted to have the child's hearsay statements to her mother and Detective Zinovitch admitted pursuant to NRS 51.385. The prosecutor had earlier supplied the defendant with the statutorily required notice of the State's intention to have the hearsay statements introduced at trial.

At the hearing mandated by NRS 51.385(1)(a), the victim's mother and Detective Zinovitch testified concerning the child's statements to them and the circumstances under which the statements were made. The court admitted the hearsay statements--as well as the victim's inconsistent statements made at the preliminary hearing--based upon the terminology, rationality, plausibility and consistency of the statements made to the mother and the detective.

DISCUSSION

When this court first reviewed Bockting's appeal challenging the admissibility of the victim's hearsay statements to her mother and the investigating officer, we concluded from the record that the district court did not err in ruling that the child victim was unavailable as a witness and that the hearsay evidence was reliable. We therefore dismissed Bockting's appeal as meritless. Upon remand from the United States Supreme Court, we have reconsidered our prior ruling in light of *Idaho v. Wright*, 497 U.S. 805, 110 S.

Ct. 3139, 111 L. Ed. 2d 638 (1990), and are convinced that Bockting's convictions must again be affirmed.

The single issue before us concerns the delicate balance between the State's right at trial to introduce an unavailable[4] child victim's hearsay statements and a defendant's right of confrontation under the Sixth Amendment to the Federal Constitution. Directly implicated in our analysis is NRS 51.385, the Nevada statute pro.iding the basis for the hearsay exception invoked by the State, and the decision of the United States Supreme Court in *Idaho v. Wright*.

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[4] Although NRS 51.385 does not require the unavailability of the hearsay declarant as a prerequisite to the admissibility of the declarant's statements, we are satisfied on this record that the trial judge correctly determined that the child was unavailable as a witness. The record reveals, as described by the prosecutor, that the child "froze" and would not even stand or communicate to take the oath. Moreover, defense counsel did not contest the district court's ruling concerning the child's unavailability as a witness.

We therefore conclude that it is unnecessary to presently decide whether unavailability is a prerequisite to the admissibility of out-of-court statements by alleged child-victim declarants where the statements do not fall within firmly rooted hearsay exceptions. We note, however, that as a general proposition, it appears that the trend in both the state and federal courts is to not make admissibility dependent upon unavailability. Furthermore, in the context of firmly rooted hearsay exceptions, the United States Supreme Court recently held that the confrontation clause of the Sixth Amendment does not require either the production of the declarant at trial or a determination by the trial court that the declarant is unavailable. *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992).

THE CONSTITUTIONALITY OF NRS. 51.385

NRS 51.385, in its entirety, provides:

51.385 Admissibility; notice of unavailability or inability of child to testify.

1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child is admissible in a criminal proceeding regarding that sexual conduct if the:

(a) Court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

(b) Child either testifies at the proceeding or is unavailable or unable to testify.

2. If the child is unavailable or unable to testify, written notice must be given to the defendant at least 10 days before the trial of the prosecution's intention to offer the statement in evidence.

The statute, enacted in 1985, was designed to address mounting societal concerns over what is generally perceived to be the rapidly growing menace of child sexual abuse. Usually, the younger the child, the greater the difficulty in achieving criminal accountability because of the sequestered setting in which the crime is usually committed, and the limited ability of very young victims to communicate the nature and extent of their travails. Sexual crimes involving children of tender years thus strain the capacity and flexibility of the criminal justice system to sensitively--and constitutionally--accommodate effective prosecution.

Fortunately, it has been determined that the Confrontation Clause does not require that a defendant be given the absolute right to confront and cross-examine adverse witnesses. Thus, in *Wright*, the Court observed that "[w]e reaffirmed only recently that '[w]hile a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as "unintended and too extreme."'" *Wright*, 497 U.S. at ___, 110 S. Ct. at 3145 (quoting both *Bourjaily v. United States*, 483 U.S. 171, 182, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987), and *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)); *see also Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (where necessary, Confrontation Clause permits the admission of hearsay statements despite inability of defendant to confront declarant at trial).

Having thus concluded long ago that the Confrontation Clause does not invariably require the right to confront, the Supreme Court more recently announced two criteria for the admissibility of hearsay statements that will satisfy Sixth Amendment constraints where the declarant is unavailable for cross-examination. First, the Confrontation Clause usually requires the prosecution to demonstrate that the declarant is unavailable. Second, upon a showing of unavailability, the hearsay statement may be admitted if: (1) the statement satisfies the indicia of a "firmly rooted" hearsay exception; or (2) the statement reflects "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).[5]

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[5] In the recent case of *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736 (1992), the Court reaffirmed its earlier clarification of Roberts as enunciated in *United States v. Inadi*, 475 U.S. 387, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986) ("*Roberts* must be read

Facially, NRS 51.385 satisfies the *Roberts* criteria for admissibility despite the unavailability of the declarant and the resultant lack of opportunity to confront. We recognize that the hearsay exception created by the statute is not "firmly rooted" in the law of evidence. However, it does require a finding validated by a special hearing that "the time, content and circumstances of the statement provide sufficient circumstantial *guarantees of trustworthiness*." NRS 51.385(1)(a) (emphasis added). The statutory language is designed, by reference to "time, content and circumstances," to provide *particularized* guarantees of a statement's trustworthiness. We therefore conclude that NRS 51.385 is constitutional on its face.[6]

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consistently with the question it answered, the authority it cited, and its own facts"), and concluded that "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." *White*, ___ U.S. ___ at ___, 112 S. Ct. at 741. As noted in footnote 4, *supra*, however, the question in *White* concerned whether it was necessary for the prosecution to produce the hearsay declarant at trial or the trial court to find the declarant unavailable as a predicate to the admissibility of out-of-court statements that fell within a firmly rooted hearsay exception.

In the instant case, the child's out-of-court statements are not within the category of a firmly rooted exception. We have elected not to decide whether a determination of unavailability is necessary where, as here, the out-of-court statements are admitted under the general hearsay exception founded upon guarantees of trustworthiness, as we have concluded that the child victim was, in fact, unavailable to testify at trial.

[6] Courts in other jurisdictions have upheld similar statutes against constitutional attack. *See State v. Bellotti*, 383 N.W.2d 308

THE CONSTITUTIONALITY OF NRS 51.385 AS APPLIED

The application of the standard provided in *Roberts* was a primary focus of *Idaho v. Wright*. The *Wright* court determined that the Constitution does not impose a fixed set of procedural prerequisites to the admission of hearsay attributable to children. *Wright*, 497 U.S. at ___, 110 S. Ct. at 3148. Nevertheless, the Court adverted to several non-exclusive factors that may be significant in determining the reliability of hearsay statements referable to children in child sexual abuse cases. The factors identified by the Court included: (1) spontaneity and consistency in repetition; (2) declarant's mental state; (3) use of unexpected terminology by child of a given age; and (4) absence of motive to fabricate. Disavowing mechanical tests for determining particularized guarantees of trustworthiness, the Court declared that "the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made." *Wright*, 497 U.S. at 821, 110 S. Ct. at 3150.

Although NRS 51.385 is not the codification of a firmly rooted hearsay exception, the statute does provide a proper forum for the evaluation and determination of the trustworthiness of child hearsay outside the presence of the jury. In such a setting, reliability may be more vigorously contested and more accurately discerned. In any event, with justifiable deference to the "unifying principle," our review

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(Minn. Ct. App. 1986); *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (Kan. 1985); *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (Wash. 1984).

now focuses on the facts of the instant case measured against the guidelines enunciated by the *Wright* court.

First, the circumstances under which the child victim initially revealed the incidents upon which the criminal charges were based generate an intuitive sense of trustworthiness. During the night, the child awoke from her sleep distressed and sobbing, and sought solace from her mother. The visibly upset six-year-old, after receiving assurances from her mother, provided the details of what had been happening to her. It strains credulity to conclude, under the conditions described, that the child's mentation would conjure up the parade of horrors she related about her stepfather. Moreover, the child's outpouring to her mother reflected a natural spontaneity indicative of truth.

The young victim's second recitation of Bockting's criminal behavior occurred during her interview with Detective Zinovitch in the latter's office. There, the girl's restatement of her travails was consistent with the details she had previously told to her mother.

The child's third consistent description of the events came when, of her own volition, she asked for dolls, and received the anatomically correct dolls. With the dolls, she demonstrated the various positions involved in the commission of the crimes. Again, the child's explanations and demonstrations with the dolls were sufficiently spontaneous to inspire confidence in their reliability. *See generally D.A.H. v. G.A.H.*, 371 N.W.2d 1 (Minn. Ct. App. 1985) (child's statements to psychologist admitted, statements were spontaneous even with the passage of time). The girl's two verbal descriptions and the demonstrations and explanations connected with the dolls indicate consistent repetition in her out-of-court statements that adds an element

of trustworthiness. *See* J. Myers, Child Witness Law and Practice § 5.37, at 367 (1987). Moreover, we were pleased to see that the veteran detective conducted the recorded interview with the child in a manner that was not suggestive, leading, or indicative of a predetermined resolve to produce evidence of child abuse.

The language used by the victim in describing what her stepfather had done to her was consistent with that expected of a six-year-old child. During her explanations of the sexual attacks, the child used such child-like terms and descriptions as "pee-pee," "butt," and "sucking on his pee-pee like a sucker" until "white bubbly stuff came out" and went into her mouth. She also described and demonstrated through the use of the dolls the positions that would have been necessary for the acts to take place between a large adult male and a small female child. In explaining how the act of anal intercourse occurred, she told how she held onto the sink while Bockting was behind her and "would press real hard and it hurt." The terminology used by the girl indicated a familiarity with sexual conduct not usually known by six-year-olds.[7] Further, the child's statements reflect knowledge of sexual acts that a child of six would not usually be aware of absent personal experience.

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[7] We note, however, that the victim's mother testified that her daughter had seen adult sexual organs in the past, had showered with both her mother and Bockting, and had seen her mother and stepfather having intercourse after entering the bedroom unnoticed by the adults. Although the mother testified to the contrary, Bockting stated that the child saw the couple engaging in oral sex, in addition to vaginal intercourse. Bockting also testified that the little girl was "interested" in sex.

Prior to describing her stepfather's conduct to her mother, the child hesitated because she was afraid Bockting would "beat her butt" and "mommy would send daddy away." After the victim's mother confronted Bockting and told him to leave, the girl wanted to hug and kiss him. This conduct is inconsistent with the notion that the six-year-old did not like her "father" or that she wanted him out of the home. In fact, the child's actions reflect feelings of affection for her stepfather. There was no apparent reason or motive for the child to fabricate a story of sexual misconduct by Bockting. "[I]t is virtually inconceivable that a child of this age would have either the extensive knowledge of sexual activities or the desire to lie about sexual abuse that would be required to fabricate a story such as the one told by [the child victim]." *Morgan v. Foretich*, 846 F.2d 941, 948 (4th Cir. 1988).

A careful comparison of the factors accorded significance in *Idaho v. Wright* with those present in the instant case causes us to conclude that: (1) sufficient spontaneity and consistent repetition existed in the child's various statements; (2) the child's mental state after a sudden awakening when she first told of her experiences was one of agitation and fear, both apparent from her statements and the fact that she was visibly shaken and crying; (3) the child's description of the incidents indicated a knowledge of sexual conduct not present in most children six years of age; (4) the child-like terminology used by the victim was reflective of candor rather than coaching; and (5) the child's display of affection for Bockting as he was preparing to leave was indicative of love rather than hate. Neither the foregoing factors nor any other aspect of the record evidence provides insights into a motive for dissembling on the part of the child. We therefore conclude that the district court was justified in finding that the

child's hearsay statements were reliable and admissible under the criteria specified in NRS 51.385 and *Idaho v. Wright*.[8]

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[8] The majority in *Idaho v. Wright* determined that for purposes of satisfying the requirements of the Confrontation Clause, corroborating evidence is not to be considered in determining the reliability of hearsay statements. 497 U.S. at 821, 110 S. Ct. at 3150. This point has been vigorously criticized by legal scholars and by Justice Kennedy and the three other justices who joined in his dissent. Of necessity, we have reluctantly adhered to the majority opinion in our resolution of this appeal. We would, however, most respectfully urge the Court to reconsider the majority view.

Aside from relevancy, the *sine qua non* of admissible evidence is reliability. Indeed, the *Wright* majority validates the admissibility of hearsay statements falling within firmly rooted exceptions on the basis of the indicia of reliability upon which they are founded. It appears to us that "corroborative evidence," as it relates to hearsay statements proffered on the basis of particularized guarantees of trustworthiness, is evidence that tends to make the reliability of the hearsay statement more probable. Such evidence seems to have special significance and justification under the "reliability" hearing mandated by NRS 51.385. The greater the corroboration, it would appear, the greater the prospect of the statement's trustworthiness. In the context of the instant case, the fact that medical evidence confirms that the child had been violated and injured by some blunt force which could include an erect adult penis, created an added element of reliability to the child's statements. The fact that there was no evidence of the victim being in the care of any adult male other than the defendant during the relevant period, was probative of reliability concerning both the fact of sexual abuse and the identity of the abuser. And yet, under the *Wright* ruling, we were forced to disregard these "particularized" sources of evidence of trustworthiness.

In viewing the totality of the circumstances surrounding the child's out-of-court statements, as defined in *Wright*, we conclude that the district court did not err in finding sufficient "particularized guarantees of trust-worthiness" to admit the proffered statements. We therefore hold that NRS 51.385 is constitutional as applied to Bockting and his rights under the Confrontation Clause.

It would also appear difficult to accurately assess the "lack of motive to fabricate" factor identified by the Wright majority without resort to evidence extraneous to the "circumstances surrounding the making of the out-of-court statement." *Wright*, 497 U.S. at 821, 110 S. Ct. at 3149. For example, if it is necessary to exclude medical evidence of sexual abuse, it would also appear necessary to exclude evidence of marital discord on the part of the parents as a possible motive in the mother for having the child fabricate charges of sexual abuse against the husband. Moreover, the conclusion of the *Wright* majority that "[t]here is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement," 497 U.S. at 805, 110 S. Ct. at 3151, seems to assume that any truth less than the entire truth is more dangerous than little or no truth at all. Even the firmly rooted exceptions to the hearsay rule are based upon probabilities short of certainty. In any event, the corroborative evidence is not, in the first instance, produced for a jury to consider in weighing the reliability of the proffered hearsay. It is the trial judge who must, under the totality of the circumstances, determine whether there are "sufficient circumstantial guarantees of trustworthiness" to permit introduction of the statement. NRS 51.385(1)(a). We are confident that our trial judges are sufficiently trained to use corroborative evidence as but one additional factor to weigh in determining the extent to which such hearsay statements bear indicia of reliability.

For the reasons stated above, we conclude that Bockting was fairly tried and convicted. Accordingly, we affirm the judgment of conviction entered by the district court.[9]

/s/ _____
Rose, C.J.

/s/ _____
Steffen, J.

/s/ _____
Young, J.

/s/ _____
Springer, J.

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[9] The Honorable Miriam Shearing, Justice, did not participate in the decision of this matter.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. CV-N-98-0764-ECR (VPC)

[Filed March 19, 2002]

MARVIN HOWARD BOCKTING,	)
Petitioner,	)
	)
v.	)
	)
ROBERT BAYER, *et al.*,	)
Respondents.	)
	)

ORDER

Petitioner Marvin Howard Bockting ("Bockting") filed a second amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his sentence and conviction (Docket #35). Respondents filed a motion to dismiss the petition under *Rose v. Lundy,* 455 U.S. 509 (1982), arguing that several claims forwarded in the petition were unexhausted (Docket #37). This court previously determined that Bockting has failed to exhaust state court remedies with regard to two of his constitutional ineffective assistance of counsel claims: (1) trial counsel was ineffective in his performance at an evidentiary hearing held to determine the admissibility of the child victim's statements and (2) trial counsel failed to adequately cross examine or impeach the direct testimony of prosecution witnesses (Docket #47).

In response, Bockting filed a declaration abandoning these claims. Thus, pending before the court at this time are the

remaining claims in the petition. These include a claim based on the Confrontation Clause, several claims based on the Due Process Clause, and three claims based on petitioner's Sixth Amendment right to effective assistance of counsel. The court has reviewed the entire record in this case, including all exhibits of the state proceedings, as well as all of the pleadings, motions and other documents filed in the record of this case. Following that review, the court concludes that the Bockting is not entitled to relief pursuant to 28 U.S.C. § 2254, and that his petition for writ of habeas corpus shall be denied.

A. Facts of Case

In January of 1988, Bockting was living in a Las Vegas motel with his wife Laura Bockting ("Laura"), Laura's six year old daughter, and Bockting and Laura's three year old daughter. On January 11, Laura started taking evening classes at a local business college. Bockting watched the two children while she was gone. According to Laura's testimony, the six year old daughter came to her on the night of January 16 and related to her details of sexual abuse by Bockting that she (the daughter) had endured one evening while Laura was away at class. Laura testified as to the various sexual acts her daughter had told her Bockting had committed during this episode.

On January 19, Laura took her daughter to the hospital where Detective Zinovitch with the Sexual Assault Unit of the Las Vegas Metropolitan Police Department unsuccessfully attempted to interview the child. The detective then ordered that the child be medically examined. He also arranged with Laura to interview the child a couple of days later. Doctor Rivers, a gynecologist, testified at trial that her examination of the child revealed injuries to the rectum and vagina that were consistent with "blunt force" having been applied to

those areas. At least with regard to the rectal injury, Doctor Rivers concluded that it had occurred within a week prior to the examination. When asked at trial whether any other males had been around the child in the week prior to the examination, Bockting answered that "when [he] was around, no one."

On January 21, Detective Zinovitch interviewed the child. The child described to the detective sexual acts very similar, if not identical, to those which she had related to Laura. He testified that the child's descriptions of these events were credible, that she used age appropriate terminology as opposed to terms normally used by adults, and that she accurately re-enacted the events using anatomically correct dolls.

At Bockting's preliminary hearing, the child became very upset during questioning and her testimony was terminated before the defense had an opportunity to cross examine her. Bockting was, nonetheless, held to answer based on the testimony of Laura Bockting and Detective Zinovitch. On August 15, 1988, Bockting's trial commenced in the Eighth Judicial District Court. Upon being called to testify at trial, the child became distraught and the court ruled that she was again unavailable as a witness. The prosecution then moved for her hearsay statements (to Laura and Detective Zinovitch) to be admissible under NRS 51.385. After an evidentiary hearing, the trial court ruled in the prosecution's favor, but also ordered that the defense would be able to present the child's preliminary hearing testimony to the Jury.

On August 18, 1988, after a three day trial, a Jury found Bockting guilty of three counts of sexual assault on a minor under the age of 14 years. On September 21, 1988, he was sentenced to life imprisonment (two consecutive terms and the

third concurrent with the second) with the possibility of parole on each count. Bockting appealed the judgment of conviction to the Nevada Supreme Court. On June 22, 1989, the Supreme Court entered an order dismissing appeal deciding that all of Bockting's contentions on appeal lacked merit.

Bockting then applied to the United States Supreme Court for a writ of certiorari. On July 5, 1989, the Nevada Supreme Court stayed the issuance of the remittitur pending the outcome of the application. On April 13, 1990, while his application to the United States Supreme Court was pending, Bockting filed a petition for post-conviction relief in the Eighth Judicial District Court.

On June 28, 1990, the United States Supreme Court issued an opinion which vacated the Nevada Supreme Court's order dismissing Bockting's appeal and remanded the matter to that Court for further consideration in light of *Idaho v. Wright,* 497 U.S. 805 (1990). The Nevada Supreme Court subsequently affirmed the petitioner's conviction on March 8, 1993, finding that the child's hearsay statements were admissible under the criteria set forth by the United States Supreme Court in *Wright*. On April 22, 1993, Bockting voluntarily dismissed his petition for post-conviction relief in the Eighth Judicial District Court, such petition having been held in abeyance while direct appeal proceedings were pending.

On March 30, 1994, Bockting filed another petition for post-conviction relief in the Eighth Judicial District Court. On July 6, 1994, the court held an evidentiary hearing despite the fact that Bockting was not present or represented at the hearing. On September 15, 1994, the court's order denying the petition was filed. Bockting appealed this order to the Nevada Supreme Court. On December 24, 1997, the Nevada

Supreme Court filed its order dismissing appeal. Bockting's next step was to file a petition for a writ of habeas corpus in this court.

B. Legal Discussion

The court has thoroughly reviewed the facts of this case and has considered carefully all of the legal points and authorities presented by Bockting and the respondents. Following that review, the court is fully apprized of the facts and circumstances regarding this matter, and finds that further briefing by the parties is neither warranted nor required. Further, the court finds that the factual record has been sufficiently developed in the state courts regarding issues presented in this petition. For any claim which Bockting contends that such factual development has not occurred, the court finds that Lord has not demonstrated that he can meet the requirements of 28 U.S.C. § 2254(e)(2). Thus, this court will not hold an evidentiary hearing in this matter.

After having examined each claim in detail, the court finds none of them sufficient to warrant the issuance of the writ.

1. Ground One

As Ground One, Bockting claims that his right to confront and cross examine a witness against him, as guaranteed by the by Sixth Amendment, was violated when the trial court allowed the child victim's hearsay statements to be admitted

at trial based on NRS 51.385.[1] Bockting argues, in apparent reference to 28 U.S.C. § 2254(d)(1), that the Nevada Supreme Court's ruling that the child's hearsay statements were reliable and, thus, admissible under the criteria set forth in *Idaho v. Wright* was an "unreasonable application" of clearly established federal law. In support of this argument, Bockting makes several factual allegations which he claims indicate that the child's statements did not have the "particularized guarantees of trustworthiness" required by *Wright*. 497 U.S. at 818-21.

The United States Supreme Court in *Wright* clarified the test for determining whether the admission at trial of hearsay statements made by an alleged child victim of sexual abuse will violate the Confrontation Clause. The Court held that the admission of such a statement will not run afoul of the Clause if the statement either (1) falls within a firmly rooted hearsay exception or (2) is supported by a showing of "particularized guarantees of trustworthiness." *Id.* If the statement does not meet the former requirement, there is a presumption of unreliability which the State must overcome by showing that statement meets the latter requirement based on "the totality of the circumstances" surrounding the making of the statement. *Id.* at 819. The circumstances that may be considered are only those "that surround the making of the statement and that render the declarant worthy of belief." *Id.* Other evidence presented at trial that might corroborate the truth of the statement is not to be considered in this inquiry. *Id.* at 822. Finally, in announcing this two-part test, the Court

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[1] NRS 51.385 provides for, under specified circumstances, the admissibility in criminal proceedings of hearsay statements describing sexual conduct made by a child under the age of 10 years.

in *Wright* declined to decide whether the child declarant's unavailability as a witness must be established before his or her out-of-court statements are admitted. *Id.* at 816.

Applying this test, the Nevada Supreme Court found that, while NRS 51.385 is not a codification of a "firmly rooted hearsay exception," the following facts nonetheless demonstrated the reliability of the child's statements:

> "(1) sufficient spontaneity and consistent repetition existed in the child's various statements; (2) the child's mental state after a sudden awakening when she first told of her experiences was one of agitation and fear, both apparent from her statements and the fact that she was visibly shaken and crying; (3) the child's description of the incidents indicated a knowledge of sexual conduct not present in most children six years of age; (4) the child-like terminology used by the victim was reflective of candor rather than coaching; and (5) the child's display of affection for Bockting as he was preparing to leave was indicative of love rather than hate."

Bockting v. State, 109 Nev. 103, 111 (1993). The Court also noted that the record was devoid of evidence of any motive the child might have to fabricate her statements. *Id.* Based on these factors, the Court concluded that the child's hearsay statements were properly admitted by the trial court under *Wright*. *Id.*

While not resoundingly convinced that the State overcame the presumption of unreliability attached to hearsay statements that do not fall within a firmly rooted hearsay exception, this court must nonetheless deny Bockting's application for habeas relief based on the Confrontation Clause. As to the reliability

of the child's hearsay statements, this court is mainly concerned with the fact that the child's abbreviated preliminary hearing testimony deviated from her previous description of events and, at no point, was the child subject to any form of cross examination or adverse questioning. Even so, the Nevada Supreme Court's decision on this issue was sufficiently consistent with federal law so as to preclude this court from granting habeas relief.

As to any habeas claim that was adjudicated on the merits by the state court, a federal court may grant relief only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In *Williams v. Taylor,* 529 U.S. 362 (2000), the United States Supreme Court provided some clarity as to how to apply 28 U.S.C. § 2254(d)(1). It held that the "contrary to" and "unreasonable application" clauses have distinct meanings. *See Williams,* 529 U.S. at 404-10; *see also, Van Tran v. Lindsey,* 212 F.3d 1143, 1150 (9th Cir. 2000). Under the "contrary to" clause, a federal court should grant the writ (1) when the state court has failed to apply the correct controlling authority from the Supreme Court or (2) when the state court has applied the correct controlling authority from the Supreme Court to a case involving facts "materially indistinguishable" from those in a controlling case, but has nonetheless reached a different result. *Van Tran,* 212 F.3d at 1150 (citing *Williams,* 529 U.S. at 406).

Under the "unreasonable application" clause, a federal court should grant the writ when the state court's application of clearly established federal law is "objectively unreasonable." *See Williams,* 529 U.S. at 409. The Ninth Circuit Court of Appeals has held that a decision is "objectively unreasonable" when it is clearly erroneous. *See*

Van Tran, 212 F.3d at 1152-54. It is not enough that the court is convinced that the petitioner has the better of two reasonable legal arguments. Instead, the court must be left "with a 'firm convictlon' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous -- in other words that clear error occurred." *Id.* at 1153-54.

Here, the Nevada Supreme Court's decision was neither "contrary to," nor did it involve "an unreasonable application of," clearly established federal law. The Nevada Supreme Court applied the correct controlling authority from the United States Supreme Court *(Idaho v. Wright)* and, although it reached a different result, this case involved facts which were materially distinguishable from those in *Wright.* In *Wright,* the Court identified only two factors (lack of motive to "make up a story of this nature" and statement not type that one would a expect a child of the given age to fabricate) relevant to a showingof the "particularized guarantees of trustworthiness." 497 U.S. at 826. Looking to the "totality of the circumstances," the Court concluded that these factors did not outweigh the presumption of unreliability of out-of-court statements and the suggestive manner in which the examining pediatrician conducted the interview. *Id.* at 826-27.

In the present case, the Nevada Supreme Court identified the five factors noted above as relevant to a showing of the "particularized guarantees of trustworthiness." It also concluded that the record contained no indication of any motive the child might have to fabricate a story of sexual abuse. Thus the facts of Bockting's case are sufficiently distinguishable from those in *Wright* to prevent this court from finding that the Nevada Supreme Court's decision was "contrary to" established federal law.

The Nevada Supreme Court's application of *Idaho v. Wright* was also not "objectively unreasonable." Despite the reservations mentioned above, this court is not left with a "firm conviction" that the application of federal law that the Nevada Supreme Court adopted was erroneous and that Bockting's position on this issue is the correct one. Other than the two points mentioned above – i.e., a deviation from prior accounts in the child's testimony at the preliminary hearing and the absence of *any* opportunity for cross examination or adverse questioning – Bockting's claims of unreliability are based largely on unsubstantiated allegations.[2] For example, Bockting claims that Laura Bockting coerced her daughter into making accusations against him and that Detective Zinovitch's interview was tainted by suggestion and constant

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[2] Bockting also makes a passing claim that the Nevada Supreme Court unreasonably applied federal law by failing to address the trial court's finding that the child victim was "unavailable" as a witness. This claim is without merit. The United States Supreme Court in *Wright* specifically noted that, for the purposes of that decision, the "requirement of unavailability" was not at issue. Thus, in complying with the U.S. Supreme Court's mandate to review its prior decision in light of *Wright*, the Nevada Supreme Court was not required to address the issue of the child victim's availability as a witness.

Nonetheless, the Nevada Supreme Court did, in fact, address this issue by noting that it was satisfied that the record supported a finding that the child was "unavailable" as a witness and that, in any case, the general trend among the state and federal courts was to find that the Confrontation Clause did not require a finding that the witness was unavailable before admitting his or her hearsay statements. *Bockting*, 109 Nev. at 106, n.4. Indeed, in *White v. Illinois*, 502 U.S. 346, 354 (1992), the Supreme Court noted that availability of the witness is relevant to a Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding.

correction in eliciting responses from the child. However, the record contains little, if any, evidence to support either of these allegations. Thus, not only was the Nevada Supreme Court's decision not an unreasonable application of federal law, it was probably the correct result given the record before the Court.

2. Ground Two

As Ground Two, Bockting claims that his due process rights under the Fifth and Fourteenth Amendments were violated based on the trial court's admission of evidence of prior bad acts and based on several instances of alleged prosecutorial misconduct. As to the former basis, the court finds that the admission of evidence of prior bad acts was neither arbitrary nor more than minimally prejudicial. Thus, Bockting's due process rights were not violated as a result of the admission of any such evidence. Similarly, as to the latter basis, this court concludes that Bockting has failed to demonstrate that his constitutional due process rights were violated based on either a single instance of alleged prosecutorial misconduct or the cumulative effect of such instances.

a. Evidence of Prior Bad Acts

In cross examining one of Bockting's character witnesses at trial, the prosecution inquired, over a defense objection, as to whether Bockting had ever informed the witness of a prior instance of the child victim making an allegation of sexual misconduct against Bockting when the family lived in Colorado. The witness testified that Bockting had never mentioned such an incident to her. Later in the trial, on rebuttal, the prosecution elicited testimony from Laura Bockting that, while living in Colorado, she had confronted

Bockting with regard to an allegation of sexual misconduct, but that, at the time, she believed Bockting's denial of the allegation.[3]

The Eight Judicial District Court, in ruling upon Bockting's petition for post-conviction relief, determined that the cross examination of Bockting's witness regarding the prior bad act was permissible because the witness had been called to testify to Bockting's character. As to Laura Bockting's rebuttal testimony, the court concluded that, because the testimony regarding the prior bad act was very limited, it was non-prejudicial and within the trial court's discretion to admit.

This court need not engage in a detailed analysis of Nevada's evidentiary rules and the issue of whether the trial court may have erred in admitting the challenged testimony. A state court's evidentiary ruling is not subject to federal habeas review on due process grounds unless "the admission of the evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair." *Walters v. Maass,* 45 F.3d 1355, 1357 (9th Cir. 1995). In Bockting's case, the admission of the evidence was not "arbitrary" in that it was arguably, if not actually, admissible under Nevada's evidence rules. *See* NRS 48.045 and 48.055.

The evidence was also not sufficiently prejudicial so as to render the trial fundamentally unfair. With regard to the cross examination of Bockting's character witness, the essence of the witness's testimony was that she had no knowledge of any

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[3] Bockting also claims that the prosecutor made reference to this incident in his closing argument, but if so, the reference is so veiled as to be inconsequential.

such prior incident. As to any prejudicial effect that may have arisen from the prosecutor's line of questioning, the jury was specifically instructed to "not speculate to be true any insinuations suggested by a question asked a witness" and that "[a] question is not evidence and may be considered only as it supplies meaning to the answer." (Exhibit AA of "Exhibits to Answer to Petition for Writ of Habeas Corpus," Docket #31).

As for Laura Bockting's rebuttal testimony, the prior bad act evidence consisted entirely of the following exchange:

Prosecutor: Without going into the details underlying this I am going to ask you the following question. Between July 1987 and October of 1987, did you have occasion to confront the defendant with allegations of sexual contact between him and [the child]?

Laura: Yes.

Prosecutor: What was his response at the time?

Laura: He denied it, said he wouldn't do anything like that, he was crying so at that time I didn't believe what [the child] said.

Prosecutor: And did you take any action or do anything at that time?

Laura: No I did not.

The admission of this testimony was not so egregious or

damaging so as to render Bockting's trial fundamentally unfair. *See, e.g, Drayden v. White,* 232 F.3d 704, 710-11 (9th Cir. 2000). In light of the weight of all the other evidence supporting Bockting's guilt, it is highly unlikely that the jury relied on this brief testimony in finding Bockting guilty of sexual assault.

b. Prosecutorial Misconduct

Bockting's allegations of prosecutorial misconduct in his petition are less than cohesive, however, he generally claims that the prosecutor in his trial was guilty of: (1) shifting the burden of proof to the defendant; (2) commenting on the defendant's right to remain silent; (3) making inflammatory comments which were not supported by evidence presented at trial; and (4) vouching for the credibility of witnesses. Bockting claims that the cumulative effect of this alleged misconduct together with the admission of the evidence of a prior bad act[4] violated his constitutional right to due process. This court finds no such constitutional violation.

Bockting contends that the prosecutor impermissibly shifted the burden of proof to the defense when, in closing argument, he pointed out to the jury that the defense had not been able to explain how the victim had received a rectal injury. Bockting also claims that the prosecutor's comments in this regard amounted to a statement that Bockting's exercise of his right to remain silent was an admission of guilt. There is no merit to either argument.

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[4] In making his "cumulative effect" argument, Bockting includes the admission of evidence of prior bad acts as an instance of prosecutorial misconduct. It is more properly characterized as an evidentiary issue, which is why this court analyzed it separately as such.

At Bockting's trial, the jury was duly instructed that the defendant was presumed innocent and that the State had the burden of proving every material element of the charged crimes beyond a reasonable doubt. The prosecutor's comments, rather than shifting the burden of proof, merely highlighted the strength of the State's case on a material element of sexual assault. The essence of the comments was that the State had proved that element beyond a reasonable doubt and that the defense had presented no evidence to the contrary. As such, the prosecutor's comments were within the bounds of permissible closing argument.

The prosecutor's comments were also not an improper comment on Bockting's exercise of his right to remain silent. As noted in *United States v. Mendes*, 43 F.3d 1298, 1301 (9th Cir. 1995), in considering the propriety of prosecutorial comments there is "a distinction between a comment on the defense's failure to present exculpatory evidence as opposed to a comment on the defendant's failure to testify." Comments of the former type are permissible as long as they are not phrased so as to call attention to the defendant's failure to testify. *Id.* Also, a comment as to the failure of the *defense*, as opposed to the *defendant*, to counter or explain prosecution evidence does not implicate a defendant's Fifth Amendment rights. *Id.* When considered based on these standards, the prosecutor's comments as to the defense's failure to explain the victim's rectal injury are beyond constitutional challenge, especially in light of the fact that Bockting chose to testify at trial.

Bockting claims that the prosecutor's references in closing argument to the victim's crying during the aborted effort to have her testify were inflammatory and not based upon "evidence" presented at trial. Bockting also cites statements in which the prosecutor referred to the trust that children

have in adults and in which the prosecutor conjectured what the victim would say if asked a specific question. This court agrees that the prosecutor engaged in misconduct by referring to the victim's crying episode, which was not admissible evidence, and by speaking on behalf of the victim in the first person. *See, Drayden,* 232 F.3d at 712-13. This finding alone, however, does not serve as a basis for habeas relief. As set forth more fully in the cumulative error analysis below, the inquiry for the federal habeas court is not whether error occurred, but rather, whether such error was of constitutional magnitude. *Id.* at 713.

Bockting's final claim of prosecutorial misconduct is that the prosecutor improperly vouched for the credibility of the State's witnesses and gave his own opinion that it would have been impossible for the victim's mother to have induced the victim to fabricate a story of sexual abuse. In this regard Bockting challenges the prosecutor's statement that testimony of Dr. Rivers "is probably some of the most important testimony that you heard . . . because it tells you something that is real, that you could see, that is not what somebody thinks." The prosecutor also made several references in his closing argument to Laura Bockting's truthfulness and candor. Finally, the prosecutor stated, in reference to the testimony of a family therapist who treated the victim, that he thought "her opinion was straightforward."

A prosecutor engages in impermissible "vouching" when he either (1) places the prestige of the government behind a witness through personal assurances of the witness's truthfulness or (2) suggests that information not presented to the jury supports the witness's testimony. *United States v. Jackson,* 84 F.3d 1154, 1158 (9th Cir. 1996). Here, the prosecutor did not impermissibly vouch for the testimony of either Dr. Rivers or the family therapist. With regard to his

comments about the testimony of Dr. Rivers, the prosecutor was merely juxtaposing the gynecologist's empirical conclusions based on her medical examination of the victim with conclusions of other witnesses which were more speculative. Similarly, by stating that the family therapist's opinion was straightforward, the prosecutor was not giving his personal assurance that the her testimony was truthful. Instead, he was accurately describing her *opinion* as plain, non-evasive and free from ambiguity.

This court also finds no misconduct in the prosecutor's statements as to the impossibility of the victim having been coached by her mother to fabricate a story of sexual abuse. Such statements were, for the most part, inferences drawn from evidence presented at trial and well within the bounds of permissible argument.

The prosecutor's repeated references to the truthfulness of Laura Bockting's testimony did, however, constitute impermissible vouching. Even so, as noted above, an instance of prosecutorial misconduct does not necessarily deprive the defendant of his or her constitutional rights. The issue for this court to decide is whether the cumulative effect of trial errors "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Thomas v. Hubbard,* 273 F.3d 1164, 1179 (9th Cir. 2002) (quoting *Donelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)). This analysis is similar to the inquiry set forth in *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993) which asks whether an error had "a substantial and injurious effect" On the outcome. *Thomas,* 273 F.3d at 1179-80.

Here, the instances of prosecutorial misconduct did not have a "substantial and injurious effect" on the outcome of Bockting's trial. If the Laura Bockting's testimony stood alone

as on the only evidence recounting the episode of sexual abuse suffered by the victim, then the prosecutor's vouching for her testimony may have been sufficient to establish a due process violation. However, this evidence was also provided by Detective Zinovitch's testimony. Thus, the most incriminating portions of Laura Bockting's testimony, rather than being the lone pillar supporting a material element of the State's case, was corroborated, and practically duplicated, by the detective's testimony.

Adding any prejudice that may have resulted from the inflammatory prosecutorial statements discussed above does not tip the scale in favor of finding a violation of Bockting's due process rights. Such prejudice was minimized by instructions given to the jury. The jury was instructed that its verdict was not to "be influenced by sympathy, prejudice, or public opinion," but instead should be "a product of sincere judgment and sound discretion in accordance with" the rules of law set forth in the jury instructions. It was also instructed that "[s]tatements, arguments and opinions of counsel are not evidence in the case." (Exhibit AA of "Exhibits to Answer to Petition for Writ of Habeas Corpus," Docket #31). Also, strong evidence of Bockting's guilt was presented at trial: medical evidence that the victim's vagina and rectum had been penetrated; Detective Zinovitch's testimony regarding the account of sexual abuse that had been related to him by the victim; and Bockting's admission that no other male individual had been alone with the victim during the time that the abuse most likely occurred. *See, Drayden,* 232 F.3d at 713. Thus, prosecutorial misconduct did not render Bockting's trial "fundamentally unfair." *Id.*

Finally, this result would not be impacted by a conclusion that the trial court's admission of the prior bad act evidence was in error. As discussed above, this evidence was so limited

as to have minimal prejudicial effect. Thus, even if considered as an additional component of cumulative error, Bockting still received a constitutionally fair trial.

3. Ground Three

As Ground Three, Bockting claims that he was deprived of his Sixth Amendment right to effective assistance of counsel both at his criminal trial and in his subsequent appeal. As noted above this court previously categorized this ground into five separate claims, two of which the court found unexhausted. The three remaining claims of unconstitutional ineffective assistance of counsel are as follows: (1) trial counsel failed to adequately investigate, prepare, or present a defense based on the theory that the child victim's mother had "coached" the victim and had otherwise manufactured evidence against the petitioner; (2) trial counsel failed to raise objections to errors in the trial court proceedings which resulted in the admission of prejudicial evidence and argument and the inability to raise such errors as issues on appeal; and (3) appellate counsel failed, in handling the appeal of Bockting's conviction, to adequately research and present appealable issues to the state supreme court.

Ineffective assistance of counsel claims are governed by the standard announced in *Strickland v. Washington,* 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show that his trial counsel's performance fell below an objective standard of reasonableness and that, as a result, the result of his trial is unreliable. 466 U.S. at 687-688. Put another way, "[t]o prevail on a claim of ineffective assistance of counsel, [petitioner] must show that his trial counsel's performance fell outside a wide range of reasonableness and that he was

prejudiced by that performance. Prejudice occurs where 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Weighall v. Middle,* 215 F.3d 1058, 1062 (9th Cir. 2000) (quoting *Strickland,* 466 U.S. at 694). Habeas petitioners claiming ineffective assistance of counsel must affirmatively demonstrate prejudice. *Cooper v. Calderon,* 255 F.3d 1104, 1109 (9th Cir. 2001).

a. Failure to Pursue "Coaching" Theory

In support of his claim that his counsel failed to pursue a viable defense theory, Bockting contends that his trial counsel should have attempted to develop evidence which Bockting claims would have demonstrated that Laura lacked credibility and that she induced the victim into making false accusations against him. Bockting asserts that, to this end, his counsel should have interviewed the six year old victim and subjected her to an independent psychological examination. He also claims that counsel should have further investigated an alleged visit Laura Bockting made to the state welfare office the day before she reported the sexual abuse of her daughter.

At the State court evidentiary hearing with regard to Bockting's petition for post conviction relief, a memorandum written by Bockting's trial counsel and dated May 5, 1988, – three months prior to Bockting's trial – was introduced into evidence. This memorandum states that counsel had considered requesting an independent psychological evaluation of the victim, but chose not to after Bockting clearly failed a polygraph examination. According to the memorandum, counsel feared that the results of such an evaluation would be damaging to the defense in that such

results would indicate that the victim was probably telling the truth. Trial counsel also testified at the evidentiary hearing that he had conducted some inquiry into Laura's purported visit to the welflhre office, but did not consider the information derived from that inquiry to be particularly compelling or relevant. Finally, with regard to trial counsel's failure to interview the victim, the prosecutor represented to the court at the evidentiary hearing that neither the victim nor her mother were willing to speak with defense counsel.

The Eight Judicial District Court found that Bockting's defense theory was supported by only his unsubstantiated allegations and that counsel's performance was not deficient because "no amount of investigation would have made [Bockting's] 'substantial defense' viable." The state court also found no showing of prejudice. While the question of ineffective assistance of counsel is a mixed question of law and fact, *see Strickland, supra,* 466 U.S. at 697, whether counsel conducted an adequate investigation is an issue of fact. This court is required to presume the correctness of factual determinations made in the state courts. 28 U.S.C. § 2254(e)(1). The state court's determination that Bockting's counsel conducted an adequate investigation into Bockting's defense theory is presumptively true.

The presumption of correctness may only be overcome by clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); *Jeffries v. Wood,* 114 F.3d 1484, 1500 (9th Cir.), *cert. denied* 522 U.S. 1008 (1997). In this case, Bockting has provided no evidence which remotely approaches this standard. He makes bare allegations in his habeas petition regarding Laura Bockting's unreliability and possible motives, but he has not brought this court's attention to any *evidence* of stones left unturned by his trial counsel which would have supported a defense theory that the victim's

mother fabricated evidence against Bockting. Consequently, even in the absence of the presumption created by the state court's findings of fact, this court would be unable to find that Bockting's trial counsel's performance fell below constitutional standards. As such, this court need not inquire into the "prejudice" prong of the *Strickland* test.

b. Failure to Object to Trial Court Errors

Bockting asserts that his trial counsel wasineffective for not objecting to the admission of prior bad acts evidence or to the instances of prosecutorial misconduct discussed in Section B.2. above. Bockting claims that, as a result, the jury heard prejudicial testimony and argument that should have been excluded at trial and such instances of trial court error were not preserved as issues for appeal.

The "prejudice" prong of the *Strickland* test (i.e., demonstrating a reasonable probability that the outcome of the trial would have been different but for counsel's errors) closely parallels the *Donnelly* standard this court used above to determine whether cumulative error "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Any distinction between these two tests does not alter this court's conclusion that Bockting's constitutional rights were not violated. For the same reason it finds that any cumulative error did not result in a deprivation of Bockting's due process rights, this court also finds that Bockting cannot demonstrate a "reasonable likelihood" that the result of his trial would have been different if the jury had not been exposed to any prosecutorial misconduct or evidence of prior bad acts.

Bockting's claim that he was also prejudiced because these issues were not properly preserved for appeal are addressed below.

a. Failure to Raise Issues on Appeal

The *Strickland* standard also applies in evaluating whether appellate counsel was unconstitutionally ineffective. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Appellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when such issues would not have provided grounds for reversal. *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001).

The Nevada Supreme Court maintains an elevated standard for obtaining the reversal of a conviction where the appellant's claim is prosecutorial misconduct or the improper admission of prior bad acts evidence. In either case, the Nevada Supreme Court will not reverse a conviction unless it is persuaded that the result of the defendant's trial would have been different but for the claimed errors. *See, e.g., King v. State*, 998 P.2d 1172, 1175-77 (Nev. 2000). For the reasons set forth herein, Bockting cannot show that there is a reasonable likelihood that the outcome of his trial depended on prosecutorial misconduct or the admission of prior bad acts evidence, even considering the cumulative effect of such claimed error.

C. Conclusion

In summary, this court finds that any errors committed by the state court in convicting Bockting do not rise to the level of constitutional violations justifying habeas relief. In addition, Bockting has not demonstrated that his Sixth Amendment right to effective assistance of counsel was

violated under the *Strickland* test. Consequently, Bockting's petition for federal habeas relief will be denied.

IT IS THEREFORE ORDERED that petitioner's second amended petition for writ of habeas corpus (Docket #35) is **DENIED**. The Clerk shall enter Judgment in respondents' favor and against the petitioner.

Dated this 19 day of March, 2002.

/s/_____
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-15866
D.C. No. CV-98-00764-ECR
District of Nevada, Reno

[Filed April 1, 2004]

MARVIN HOWARD BOCKTING,
Petitioner - Appellant,

v.

ROBERT BAYER,
Respondent - Appellee.

Before: WALLACE, NOONAN, and McKEOWN, Circuit Judges.

ORDER

The parties are directed to file, within twenty-eight (28) days from the date of this order, simultaneous briefs of no more than twenty (20) pages responding to the following questions:

(1) Should this court apply *Crawford*'s new-constitutional rule retroactively to *Bockting*'s collateral proceedings? *See Crawford v. Washington*, 2004 WL 413301 at *13.

(2) Which, if any, of the hearsay accusations admitted at trial are admissible under *Crawford*?

(3) Assuming a Confrontation Clause violation occurred, should this court consider the error harmless and affirm the denial of petition?

(4) Should the petition be remanded to state court for reconsideration in light of *Crawford*?

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 02-15866
D.C. No. CV-N-98-0764-ECR
(Nevada, Reno)

[Filed April 28, 2004]

MARVIN HOWARD BOCKTING,	)
Petitioner-Appellant,	)
	)
v.	)
	)
ROBERT BAYER,	)
Respondent-Appellee.	)
	)

Appeal from
The United States District Court
For the District of Nevada

APPELLANT'S SUPPLEMENTAL BRIEF

[Table of Contents and Table of Authorities
Omitted in this Appendix]

ISSUES PRESENTED FOR REVIEW

In its order of April 1, 2004, this Court directed the parties to respond to the following questions:

1. Should this Court apply *Crawford*'s new constitutional rule retroactively to *Bockting*'s collateral proceedings?

2. Which, if any, hearsay accusations admitted at trial are admissible under *Crawford*?

3. Assuming a Confrontation Clause violation occurred, should this Court consider the error harmless and affirm the denial of the petition?

4. Should the petition be remanded to state court for reconsideration in light of *Crawford*?

I.

CRAWFORD V. WASHINGTON APPLIES TO THIS CASE

Introduction

Crawford v. Washington, 124 S.Ct. 1354 (2004) removes any doubt that the Nevada Supreme Court's determination that cross-examination of the only witness against Bockting was unnecessary was contrary to and an unreasonable application of clearly established federal law. Throughout the opinion, as detailed below, the Supreme Court makes clear that although there have been deviations in rationale, the results in prior decisions have been consistent with a rule that requires unavailability and prior opportunity to cross-examine before testimonial hearsay evidence may be admitted in a criminal trial. Neither of those conditions was met in Mr. Bockting's trial and *Crawford* tells us that relief would have been granted before the *Crawford* opinion.

Crawford can, and should be, applied retroactively to reach the same result. The issues of whether the rule is a "new rule" and whether it is a "watershed" rule are addressed below. The rule is not new as it is based in the common law and a long line of historical precedent. At the same time, it can be considered a "watershed" rule essential to an accurate and fair proceeding because, to the extent that *Ohio v. Roberts* deviated from bedrock constitutional guarantees, *Crawford* re-established them.

The Non-Retroactivity Principle

In *Teague v. Lane*, 489 U.S. 288 (1989), the court held that generally a habeas petitioner may not benefit from a new

role that was adopted after the defendant's conviction became final. The application of *Teague* involves a three step analysis:

> First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the Court must survey the legal landscape as it then existed and determine whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution. Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

Jones v. Smith, 231 F.3d 1227, 1236 (9th Cir. 2000), quoting *Caspari v. Bohlen*, 510 U.S. 383 (1994).

There is no question here that *Crawford v. Washington* was decided after Bockting's case became final on direct appeal. To determine, though, whether Mr. Bockting can benefit from the rule announced in *Crawford*, this court must first decide whether the rule is a "new rule" and then whether there is an exception to the *Teague* doctrine which is applicable.

The Holding in *Crawford* Is Not a New Rule

"'[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] if the result was not dictated by precedent existing at the time the defendant's conviction

became final.'" *Jones v. Smith*, 231 F.3d 1227, 1236 (9th Cir. 2001) quoting *Teague*, *Supra* at 489 U.S. 301. Another way that novelty has been defined is whether the rule "would represent a 'development in the law over which reasonable jurists [could] disagree.'" *Graham v. Collins*, 506 U.S. 461 (1993)(concurring opinion, Souter, J.), quoting *Sawyer v. Smith*, 497 U.S. 227 (1990). The existence of conflicting authority is not enough to support a determination that a rule resolving that conflict is a new one. *Id.*

Assessing the novelty of the rule announced in *Crawford* (since the concurring opinion suggests that the majority opinion overruled *Ohio v. Roberts*, 448 U.S. 56 (1980))[1] might seem to be a foregone conclusion. It is not. The majority opinion makes it clear that the rule adopted in *Crawford* reaches back to "Roman times," was a settled rule of common law by 1696, and was incorporated in the Confrontation Clause by the Framers. *Crawford*, *supra* at 124 S.Ct. 1366, n.5. Moreover, citing a series of cases, **including** *Ohio v. Roberts*[2], which conditioned the admission of "testimonial" evidence on a prior opportunity to cross-examine, the court emphasized that,

> [o]ur cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trail have been admitted only where the

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[1] The majority opinion does not use the term "overruled" when addressing *Roberts*. The majority suggests only that the Roberts opinion "strays" from historical precedent and that its rationale is not consistent with the constitutional principles delineated in the opinion

[2] *Ohio v. Roberts*, *Supra*; *Lilly v. Virginia*, 527 U.S. 116 (1999); *Bourjaily v. United States*, 483 U.S. 171 (1987).

> declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

Crawford, *supra*, at 124 S.Ct. 1369.

The Supreme Court did not ignore the fact that *Ohio v. Roberts* constituted a departure from the historical principles described in the opinion. Rather, the court explained that "the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales." *Crawford*, *supra*, at 124 S.Ct. 1369[3].

The test, then, is whether the rule in Crawford can be "meaningfully distinguished from that established by binding precedent" at the time that the Nevada Supreme Court applied *Roberts*. *Wright v. West*, 505 U.S. 277 (1992). The majority and concurring opinions agree that, while the rationale of *Roberts* departed from a long line of precedent, the result was consistent with the rule in *Crawford*. Either there is no meaningful distinction from the long line of cases cited in the opinion or the Nevada Supreme Court unreasonably applied the precedent in place at the time it decided this case.

Exceptions to *Teague*'s Non-Retroactivity Rule

If the holding in *Crawford* announces a new rule, then this court must determine whether it is the kind of rule which should be applied retroactively under the two *Teague*

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[3] This discussion in the Supreme Court opinion supports a determination by this court that the Nevada Supreme Court's application of *Ohio v. Roberts* was unreasonable. Chief Justice Rehnquist, concurring in the opinion, would have reversed based upon an application of *Roberts* and *Idaho v. Wright*.

exceptions. A new rule is to be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority." *Teague*, *supra*, at 489 U.S. 307. That exception is not applicable here. The second *Teague* exception appears to be designed for the rule announced in *Crawford* which is based explicitly on the historical understanding of the confrontation guarantee at the time the Constitution was adopted, and thus imposes a procedure "implicit in the concept of ordered liberty." *E.g. Pointer v. Texas*, 380 U.S. 400, 403 (1965)(confrontation is a fundamental right made obligatory upon the states under the Due Process clause). A habeas petitioner can receive the benefit of a new rule that "requires the observance of those procedures that are implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 307. This court has described the second exception as follows:

> The second exception in *Teague* allows courts to apply certain "watershed rules of criminal procedure" retroactively. These rules must be applied retroactively if a failure to adopt them will result in an impermissibly large risk that the innocent will be convicted and if the procedure at issue implicates the fundamental fairness of the trial.

United States v. Sanchez-Cervantes, 282 F.3d 664, 668-669 (9th Cir. 2002).

Retroactive application is available when the rule improves the accuracy of the trial and changes "our understanding of the 'bedrock procedural elements essential to the fairness of a proceeding.'" *Id.*, quoting *Sawyer v. Smith*, 497 U.S. 227 (1990).

Admittedly, this exception is narrow. The Supreme Court has used the decision in *Gideon v. Wainwright* as an example of the kind of rule which would qualify. *See, e.g., Tyler v. Cain*, 533 U.S. 656 (2001). The requirement of unavailability and opportunity to cross-examine, if it is a new rule, is so fundamental to the fairness of the trial and the accuracy of the outcome that it must be the kind of rule envisioned by the second *Teague* exception.

The language in *Crawford* provides the best evidence that the Supreme Court saw the rule as essential to an accurate and fair proceeding:

Accuracy of the Trial

> Nothing can be more essential than the cross examining [of] witnesses...124 S.Ct. at 1362.
>
> We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability. 124 S.Ct. at 1366-67.
>
> ...the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. 124 S.Ct. at 1370.

The ambiguity of [the hearsay statements] made it all the more imperative that they be tested to tease out the truth. 124 S.Ct. at 1373.

...we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion. 124 S.Ct. at 1373.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure. 124 S.Ct. at 1377 (Concurring Opinion)

Bedrock Principles Essential to Fairness of the Proceeding

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. 124 S.Ct. at 1359.

"[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." 124 S.Ct. at 1363.

...one of the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." 124 S.Ct. at 1363.

> "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of cross-examination. This, the law says, he shall under no circumstances be deprived of...." 124 S.Ct. at 1367.
>
> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. 124 S.Ct. at 1374.

In this case, Petitioner was convicted primarily on the basis of the wholly un-cross-examined statements of the alleged victim. Applying the *Crawford* rule here would clearly reduce the "impermissibly large risk that [an] innocent [man] was convicted," and "implicate[s] the fundamental fairness of the trial." *Sanchez-Cervantes*, 282 F.3d at 668-669; *see Dutton v. Evans*, 400 U.S. 74, 89 (1970)(right of cross-examination "helps ensure the 'accuracy of the truth-determining process' [citations omitted]"); *Pointer v. Texas*, 380 U.S. at 405 (cross-examination is "essential and fundamental for...fair trial.")

II.

THE HEARSAY ACCUSATIONS MADE TO THE MOTHER AND TO THE POLICE OFFICER WERE INADMISSIBLE

Statements Taken by the Police

At trial, Detective Zinovitch testified that when he first tried to talk to Autumn Bockting, she wouldn't talk to him. EOR 102. On January 21, 1988, four days after the criminal

conduct was alleged to have taken place, the detective transported Autumn and her mother to his office where he questioned Autumn. EOR 103. Autumn's responses to that interrogation, describing various acts of sexual molestation were admitted into evidence at the trial. EOR 106-113. The opinion in *Crawford* is explicit that "statements taken by police officers in the course of interrogations" are testimonial in nature. 124 S.Ct. at 1364. As such, the declarant must be unavailable and have been subject to prior cross-examination to be admissible. There is simply no question that under *Crawford*, the hearsay accusations of the child brought in through Detective Zinovitch are not admissible.[4]

Statements to the Mother

Laura Bockting, the estranged wife of Appellant, testified that on January 16, 1988, Autumn Bockting, her daughter and Appellant' s stepdaughter "looked like she had just woke up from a bad dream and was quite upset." EOR 142. At first, the child wouldn't tell her why she was upset, so Laura Bockting pressed her, according to her testimony. EOR 142. Laura Bockting testified that she told the child that she "wanted her to tell me what was the matter" and that she "made her go into more detail." EOR 143. The hearsay responses to those questions from her mother were admitted into evidence at the trial. EOR 81-82.

Crawford directly decided only that statements made to police officers were testimonial and thus inadmissible absent

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[4] There were also statements elicited by a counselor engaged by the prosecutor. The child denied that anything had occurred to the counselor. Those statements would also be testimonial and thus inadmissible.

the conditions set forth in the opinion. The court, however, did address what would probably not be testimonial. The court suggests that an "off-hand, overheard remark," while unreliable, does not resemble the civil-law abuses which the Confrontation Clause sought to address. 124 S.Ct. at 1364. The Confrontation Clause applies to "witnesses" or those who "bear testimony," and "testimony" is defined as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* Several examples of the "core class of 'testimonial statements" were listed in the opinion, citing to the parties' briefs: affidavits, custodial examinations, prior testimony, pretrial statements that declarants would reasonably expect to be used prosecutorially, depositions. The court included, as an example of the kinds of statements which might be considered to be testimonial, "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 124 S.Ct. at 1364.

The child's statements to her mother were definitely not off-hand overheard remarks. The statements were, on the other hand, statements that were elicited by the mother under circumstances that would lead the declarant to believe that the statements would be available for use at a later trial. Accordingly, while statements other than to police were not specifically decided in *Crawford*, the hearsay introduced through the mother would not be admissible absent unavailability and an opportunity to cross-examine the declarant.

III.

THE CONFRONTATION CLAUSE VIOLATION CANNOT BE HARMLESS IN THIS CASE

The only evidence which connects Mr. Bockting to sexual molestation of Autumn Bockting was the hearsay statements of Autumn introduced through the police officer and her mother. There was no DNA; there was no confession; the mother did not testify that she had seen anything occurring. At the Preliminary Hearing and to the prosecutor-selected counselor, the child denied that the events happened.

Should this court determine that the Confrontation Clause was violated by the admission of the statements of the child to the police officer but the statements to the mother could come in, the error cannot be harmless. Laura Bockting's credibility was at issue due to the rocky relationship between the couple, the fact that she waited over two days to take the child to the hospital, her testimony that immediately after she said she was told about the molestation, she left the child alone with Appellant, and her background as an alcohol and drug abuser. *See* Statement of Facts. The hearsay statements introduced through the police officer were critical to the prosecutor's case in order to corroborate Laura Bockting.

IV.

THE PETITION SHOULD NOT BE REMANDED TO STATE COURT

If this court determines that *Crawford* applies to this case, this court should order that the Writ of Habeas Corpus should be granted and that the matter should be remanded to state court for a new trial.

The matter should not be remanded to the Nevada Supreme Court for reconsideration in light of *Crawford*. Appellant was convicted in 1988. This is his first federal habeas petition. It has taken sixteen years for any court to seriously consider his claims. The delay is primarily attributable to the delays which occurred in the state courts.

If the rule in *Crawford* is applied to this case, reversal of the conviction is required. The Confrontation Clause was violated when the only testimony which connected the Appellant to the crime was in the form of hearsay, there was no demonstration of unavailability and there was no prior opportunity to cross-examine. There is no further record to be made in the state courts and can be no debate as to the appropriate result.

V.

CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately spaced 14-point. The total number of words is 3,288.

Respectfully submitted,

/s/

FRANNY A. FORSMAN
Federal Public Defender

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 02-15866
D.C. No. CV-N-98-0764-ECR
(Nevada, Reno)

[Filed April 29, 2004]

MARVIN HOWARD BOCKTING,	)
Petitioner-Appellant,	)
	)
v.	)
	)
ROBERT BAYER, et al.	)
Respondents-Appellees.	)
	)

Appeal from
The United States District Court
For the District of Nevada

APPELLEE'S SUPPLEMENTAL BRIEF

[Table of Contents and Table of Authorities
Omitted in this Appendix]

I.

STATEMENT OF THE ISSUE

After briefing and argument, the Court entered an Order for the briefing on the question of whether the Supreme Court's decision in *Crawford v. Washington*, ___ U.S. ___, 124 S.Ct. 1354 (2004) should apply retroactively to this habeas corpus appeal.

II.

INTRODUCTION

In *Crawford*, the Supreme Court redefined the test for the admissibility of certain out-of-court statements made by unavailable witnesses, i.e., those made pursuant to "examinations" or which are testimonial in nature, rejecting the "indicia of reliability" standard set forth in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980):

> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. Cobham's examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, e.g., Campbell, 30 S.C.L., at 130... That interrogators are police officers rather than

> magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function...

Crawford, 124 S.Ct. at 1364-1365. The Court held that ex parte statements made to the police for testimonial functions were at the core of their concerns, while many hearsay statements do not implicate the protections of the Sixth Amendment:

> First, the principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's... The Sixth Amendment must be interpreted with this focus in mind .... This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.

Crawford, 124 S.Ct. at 1363-1364.

The majority held that various formulations of suspect statements exist:

> Various formulation of this core class of 'testimonial' statements exist: '*ex parte* in-court testimony of its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that

> the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' Brief for Petitioner 23; 'extrajudicial statements ...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' *White v. Illinois*, 502 U.S. 346, 365, 116 L. Ed. 2d 848, 112 S.Ct. 736 (1992). (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); 'statements that were made under circumstances which would lead an objective witness reasonably to that the statement would be available for use at a later trial,' Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.

Crawford, at 1364.

If the *Crawford* decision were to have any application to the instant matter, it would be based on Justice Scalia's finding that "In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class. *Crawford*, 124 S.Ct. at 1365. In the instant matter, during the State court trial, after the trial court judge found the child sexual assault victim unavailable, he permitted a police officer, Detective Zinovitch of the Las Vegas Metropolitan Police Department, to testify regarding a statement he had obtained from the child about the sexual assault committed by the Petitioner, under the standard set

forth under *Ohio v. Roberts*, 448 U.S. 56 (1980). See, Appellees' Answering Brief, at 3-6.

If applied to the instant matter, the *Crawford* decision would substantially change the legal analysis applicable to such claims. However, *Crawford* should not be applied retroactively to Bockting's conviction, which was final prior to the date of the *Crawford* decision. Secondly, even if Crawford were applicable to Bockting's case, it would change nothing because the statements made to the officer by the child sexual assault victim about which the officer testified were first made to the child's mother, who also testified about those statements. The admissibility of the mother's testimony regarding the child's statement to her about the assault would be unaffected by the Crawford decision since Crawford applies only to statements made pursuant to police interrogation.

III.

ANALYSIS OF APPLICATION

A. If applied to Bockting's case, The *Crawford* decision would have no effect on the outcome since the testimony of the mother of the child sexual assault victim would still be fully admissible.

It is argued below that the new *Crawford* decision cannot be applied retroactively. However, even if *Teague* could be overridden and the case found to be applicable, it would have no impact on Bockting's case since the testimony of the mother of the child sexual assault victim would still be admissible at trial. As set forth above from the language of the *Crawford* decision, the decision applies only to *ex parte* testimonial-type evidence elicited through police

interrogation. In Bockting's case, statements of the child were admitted pursuant to *Idaho v. Wright*, 497 U.S. 805 (1990), and *Ohio v. Roberts*, 448 U.S. 56 (1980) through two individuals–the child's mother and the investigating officer. See, Answering Brief, at 3-6, 21. The primary witness regarding the child's statements was her mother. Under *Crawford* this testimony would still be admissible since it was not the product of an interrogation. The court will remember the discussion during oral argument about the fact that the child woke at night and reported the assaults to her mother when her mother had no idea about what was troubling the child. See, also, EOR 79-86. Because the testimony of the child's mother would be unaffected by the Crawford decision, since it was not the product of an interrogation, and the evidence of the sexual assault would still be admissible, the Crawford decision would have no effect on Bockting's case.

B. *Crawford* should not be applied retroactively in a collateral attack to a conviction that became final prior to the date of the *Crawford* decision.

The Supreme Court has formulated rules for when a new rule of law would apply retroactively in a collateral attack. In *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989), the Court held that, in most instances, new rules do not apply retroactively. Since *Teague*, therefore, the presumption is against the retroactive application of new rules to cases on collateral attack.

The general principle is that an opinion applying an existing or "old rule" is applicable to collateral attack cases, while a "new rule" applies only to cases that are not final when the decision is announced. A case becomes final when the judgment of conviction has been rendered, the availability of an appeal exhausted, and the time for a petition for

certiorari has elapsed. *Id.*, 489 U.S. at 295, 109 S.Ct. at 1067; *Allen v. Hardy*, 478 U.S. 255, 258, n. 1, 106 S.Ct. 2878, 2880, n. 1 (1986) (declining to apply the *Batson* rule retroactively).

1. The Rule on Retroactivity

In the State court proceedings, the Nevada state courts applied the law as it had been defined by the Supreme Court. *Teague* was designed to avoid punishing the State criminal process after the fact for doing that which was commanded at the time by the Supreme Court. In *Teague*, the Court considered the burden that widespread retroactivity would have on the states' judicial resources and the need for finality in criminal adjudications and held that a new constitutional rule of criminal procedure will not apply retroactively to cases on collateral review unless the new rule falls within one of two exceptions. One, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311, 109 S.Ct. at 1075. The second exception states that a new rule of constitutional law will be applied if it is a "watershed rule[] of criminal procedure," i.e., if it requires the observance of those procedures that are implicit in the concept of ordered liberty." *Teague*, 489 U.S. 311, 109 S.Ct. at 1075.

2. *Crawford* announces a New Rule.

A case announces a "new rule" of constitutional law if the result "was not *dictated* by precedent existing at the time defendant's conviction became final." *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 (emphasis in original). The *Crawford* Court described its decision as revising its doctrine to reflect

more accurately the original understanding of the Confrontation Clause, explicitly rejecting the "particularized guarantees of trustworthiness" test of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980) and its progeny:

> Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. Roberts conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' 448 U.S., at 66, 65 L. Ed. 2d 597, 100 S.Ct. 2531. This test departs from the historical principles identified above in two respects. First, it is too broad: it applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: it admits statements that *do* consist of ex *parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations...The Roberts test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribes method of assessing reliability with a wholly foreign one... The Raleigh trial itself involved the very sorts of reliability determinations that Roberts authorizes...Dispensing with confrontation because testimony is obviously reliable is akin to dispensing

> with jury trial because as defendant is obviously guilty.

Crawford, 124 S.Ct. at 1369-1371.

These words stand as a clear condemnation of the *Roberts* rule. The Court rejected the "open-ended balancing test" it had applied in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980) and its progeny and replaced it with a "categorical constitutional guarantee" that the Court ruled was constitutionally prescribed. *Crawford*, 124 S.Ct. at 1373. The Court expressly elected to overrule *Ohio v. Roberts*, instead of following it by simply reweighing its reliability factors and finding that the particular evidence at issue fell short. *Crawford*, 124 S.Ct. at 1373. Clearly, a decision announces a new rule if it expressly overrides a prior decision. *Graham v. Collins*, 506 U.S. 461, 467, 113 S.Ct. 892, 897 (1993).

Under these principles, *Crawford* announced a "new rule" within the meaning of *Teague*. Indeed, 'the concurring Justices in *Crawford* characterized the opinion as a "new rule." *Crawford*, 124 S.Ct. at 1378 (Rehnquist, C.J. and O'Connor, J. concurring in the judgment).

3. Neither *Teague* Exception Applies Here

Crawford does not articulate any prohibition on the power of a criminal law-making authority to proscribe individual conduct. Thus, the first *Teague* exception does not apply.

The second *Teague* exception rests in large part upon the importance of finality. The Court wrote that application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality,

without which the criminal law is "deprived of much of its deterrent effect." *Teague*, 489 U.S. at 309, 109 S.Ct. at 1074. "No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *Teague*, 489 U.S. at 309, 109 S.Ct. at 1075. Moreover, state courts are "understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a habeas proceeding, new constitutional commands." *Teague*, 489 U.S. at 309, 109 S.Ct. at 1075 (quoting *Engle v. Isaac*, 456 U.S. 107, 128, n. 33, 102 S.Ct. 1558, 1572, n. 33 (1982)). In the proceedings in the Nevada Supreme Court after remand from the United States Supreme Court, the State High Court did exactly that which the Highest Court had ordered.

In order to satisfy the second *Teague* exception, a new rule must meet two requirements: (1) infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and (2) the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding, *Tyler v. Cain*, 533 U.S. 656, 665, 121 S.Ct. 2478, 2484 (2001) (quotation marks and citations omitted) (declining to apply the *Cage* decision retroactively). The new rule announced in *Crawford* does not meet either component of the second *Teague* exception.

First, the *Crawford* rule does not seriously diminish the likelihood of obtaining an accurate conviction. Cross-examination is admittedly a tool or procedure for determining the reliability of testimony in criminal trials. *Crawford*, 124 S.Ct. at 1373. Similarly, the judicial determination under *Ohio v. Roberts* was also a procedure for determining the

reliability of evidence, albeit one that was not prescribed by the Constitution. *Crawford*, 124 S.Ct. at 1370. The difference between the two procedures is largely whether the judge determines reliability by application of a multi-factored test or whether the jury determines reliability through the process of adversarial testing.

A shift from the judge to the jury as factfinder does not substantially increase the accuracy of the ultimate factual determination. *See United States v. Sanders*, 247 F.3d 139, 149 (4th Cir. 2001) (holding that *Apprendi* should not be applied retroactively); *Bilzerian v. United States*, 127 F.3d 237, 241 (2nd Cir. 1997) (holding that the rule in *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 (1995) merely shifts the determination of materiality from the judge to the jury, and thus does not improve accuracy or alter our understanding of the bedrock procedural elements essential to the fairness of a trial).

Furthermore, the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. *Delaware v. Fensterer*, 474 U.S. 15, 21, 106 S.Ct., 292, 294 (1985) (emphasis added). Thus guaranteeing the right to cross-examination does not necessarily guarantee effective testing of the testimony that is subject to cross-examination. *See Crawford*, 124 S.Ct. at 1370 (the Confrontation Clause does not demand that evidence be reliable, but that reliability be assessed in a particular manner). Accordingly, the concurring Justices noted in *Crawford* that the Court was adding little to a trial's truth-finding function by requiring cross-examination instead of the *Ohio v. Roberts* procedure. *Crawford*, 124 S.Ct. at 1378 (Rehnquist, C.J. and O'Connor, J. concurring in the judgment).

Second, the *Crawford* rule does not alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. The second Teague exception applies to watershed rules of criminal procedure that are "necessary to the fundamental fairness of the criminal proceeding." *Sawyer v. Smith*, 497 U.S. 227, 241-242, 110 S.Ct. 2822, 2831 (1990). Such a rule must alter our understanding of the "bedrock procedural elements essential to the fairness of a proceeding." *Id.* 497 U.S. at 242, 110 S.Ct. at 2831.

Teague itself observed that procedures qualifying for retroactive application under the second exception "would be so central to an accurate determination of innocence or guilt, *we believe it unlikely that many such components of basic due process have yet to emerge.*" *Teague*, 489 U.S. at 313, 109 S.Ct. at 1077 (emphasis added). Indeed, the Court observed that the second exception was "best illustrated by recalling the classic grounds" justifying a write of habeas corpus -- proceedings dominated by mob violence, knowing use of perjured testimony, or conviction based on confessions extorted from the defendant by brutal methods. *Teague*, 489 U.S. at 313-14, 109 S.Ct. at 1977 (quoting *Rose v. Lundy*, 455 U.S. 509, 544, 102 S.Ct. 1198, 1216-17 (1982) (Stevens, J., dissenting)).

The *Teague* Court concluded that the rule proposed by the petitioner in that case -- that the petit jury be comprised of a "fair cross section of the community" -- was a "far cry from the absolute prerequisite to fundamental fairness that is implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 314, 109 S.Ct. at 1078; *see also Saffle v. Parks*, 494 U.S. 484, 487, 495, 110 S.Ct. 1257, 1259, 1264 (1990).

One case has noted that the United States Supreme Court has refused to apply "new rules" in 11 cases, including the rule announced in the litigation-spawning *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). *United States v. Mandanici*, 205 F.3d 519, 529 (2nd Cir.), *cert. denied*, 531 U.S. 519 (2000). More specifically, lower federal courts have refused to find that the second *Teague* exception applied to specific new pronouncements concerning the Confrontation Clause. *See Garcia v. United States*, 278 F.3d 1210, 1215 (11th Cir.), *cert. denied*, 537 U.S. 855 (2002) (the Confrontation Clause rights implicated in *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998) did not meet fundamental fairness prong of *Teague*'s second exception); *Earnest v. Dorsey*, 87 F.3d 1123 (10th Cir.), *cert. denied*, 519 U.S. 1016 (1996) (rule announced in *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 31139 (1990), which excluded corroborating evidence from consideration in determining reliability did not fit into either of *Teague* exceptions).

The *Crawford* Court identified the Sixth Amendment Confrontation Clause as a "bedrock procedural guarantee." *Crawford*, 124 S.Ct. at 1359. However, this does not mean that the rule adopted in *Crawford* is itself a bedrock procedural guarantee. Although the Confrontation Clause, itself, is a "bedrock procedural clement," rules announcing how to implement the Clause may not themselves qualify as such. As the United States Court of Appeals for the Tenth Circuit noted in *Johnson v. McKune*, 288 F.3d 1187 (10th Cir.), *cert. denied*, 537 U.S. 1050 (2002);

> Not every holding that draws on a wellspring rule is itself a wellspring holding. "Watershed principles in turn spawn numerous subsidiary questions, which are closer to the constitutional margins. These subsidiary questions may qualify as arguable applications of a

> bedrock principle, but they are not core guarantees themselves."

Johnson v. McKune, 288 F.3d at 1199 (citations omitted). *Crawford* clarified that cross-examination is a requirement under the Confrontation Clause in admitting "testimonial" statements, but it did not alter our understanding of what constitutes "confrontation."

Another consideration in determining whether a new rule is a watershed decision that falls under the second *Teague* exception is whether error in applying the new rule is subject to plain or harmless error review. *See Coleman v. United States*, 329 F.3d 77, 90 (2nd Cir.), *cert. denied*, 124 S.Ct. 840 (2003) ("it would be anomalous to say, on the one hand, that *Apprendi* errors are not 'structural'--i.e., that they do not inherently deprive defendants of 'basic protections,' or 'substantial rights' -- and then to say, on the other hand, that *Apprendi* announced a 'watershed' rule of criminal procedure") (citations omitted); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir.), *cert. denied*, 537 U.S. 1098 (2002) (reasoning that since *Apprendi* error can be excused as harmless error where evidence is overwhelming, *Apprendi* cannot be considered a watershed decision that is fundamental to due process). *Compare Summerlin v. Stewart*, 341 F.3d 1082, 1119 (9th Cir. 2003) ("[t]hat *Ring* error is structural is a critical consideration in determining whether the second *Teague* exception has been satisfied"), *cert. granted*, 124 S.Ct. 833 (2003).[1]

The United States Supreme Court has held that error arising from violation of the Confrontation Clause is subject

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[1] *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002).

to harmless error review. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 (1986).

Nothing in *Crawford* suggests otherwise. Because violations of the Confrontation Clause do not constitute structural error, the second *Teague* exception is not implicated. Although *Crawford* provides defendants with significant procedural protections in criminal proceedings, the standard required to apply a rule retroactively is high, and has not been met here.

IV.

CONCLUSION

For the reasons set forth above, the *Crawford* case has no application to the instant proceedings.

DATED this 29th day of April, 2004.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-15866

[Filed February 22, 2005]

MARVIN HOWARD BOCKTING,
Petitioner-Appellant,

v.

ROBERT BAYER,
Respondent-Appellee.

Appeal from the United States District Court
for the District of Nevada
D.C. No. CV-98-00764-ECR
Edward C. Reed, District Judge, Presiding

Before: J. Clifford Wallace, John T. Noonan, and M. Margaret McKeown, Circuit Judges

OPINION

McKEOWN, Circuit Judge

Marvin Bockting's conviction for sexual abuse and life sentences stem from a trial in which the only witness to the conduct, his six-year old stepdaughter, Autumn Bockting, did not testify at trial, but whose interview with a detective was admitted as key evidence. Autumn's statements at the interview contradicted her testimony at a preliminary hearing where she claimed not to remember what happened with her

father. Admission of the interview evidence without cross-examination violated Bockting's constitutional right "to be confronted with the witnesses against him." U.S. Const. amend. VI.

Although this case has been before the Nevada Supreme Court twice and before the United States Supreme Court on one occasion, resolution now rests on interpretation of an intervening Supreme Court case: *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In *Crawford*, the Court definitively held that "testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine." 124 S. Ct. at 1369. Because the little girl's testimony, which was not subject to cross-examination, was central to the conviction, its admission can hardly be classified as harmless error. *Crawford* dictates reversal.

The thorny issue is whether *Crawford* applies retroactively to this state habeas appeal. In an earlier case, we reserved this question for future consideration. *See Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir. 2004) (per curiam). If, as Judge Noonan argues, *Crawford* simply reiterates a longstanding rule and does not announce a new rule, then retroactivity falls out of our analysis. If, on the other hand, *Crawford* is characterized as a "new rule," then we are faced with analyzing the retroactivity of *Crawford* in the framework of yet another recent Supreme Court case, *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). New rules apply retroactively only where they place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or where the new rule is "implicit in the concept of ordered liberty." *Teague v. Lane*, 489 U.S. 288, 307, 109

S. Ct. 1060, 103 L. Ed. 2d 334 (1989). The latter category is "reserved for watershed rules of criminal procedure." *Id.* at 311.

The threshold question is whether *Crawford* constitutes a "new rule" under *Teague*. Judge Noonan's approach--namely that *Crawford* does not announce a new rule but rather is a "correction of a misinterpretation," Concurrence at 2015--has a certain appeal in light of the Court's historical emphasis in *Crawford*. Indeed, one can read *Crawford* as intimating that the rule is longstanding. Unfortunately, Justice Scalia's analysis is not entirely consistent with that viewpoint. Nonetheless, characterizing *Crawford* as something less than a new rule, as Judge Noonan does, is one legitimate way of interpreting *Crawford*. To do so leads to the same result here--the application of *Crawford* to Bockting's pending habeas claims.

Despite the appeal of Judge Noonan's reasoning, application of the Supreme Court's guidance in *Teague* leads to the conclusion that *Crawford* announces a "new rule." Because the *Crawford* rule is both a "watershed rule" and one "without which the likelihood of an accurate conviction is *seriously* diminished," *Summerlin*, 124 S. Ct. at 2523, the rule is retroactive.

I. FACTUAL BACKGROUND

Marvin Bockting lived with his wife, Laura, and his two daughters, Autumn and Honesty, in a motel in Las Vegas. Autumn had taken showers together with Laura and Bockting. She had also seen them having sex, and she was accustomed to the use of sexual language.

One Saturday night, when Laura was at home alone with the children, Autumn Bockting woke up crying. Her mother observed that "she looked like she had just woken up from a bad dream and she was quite upset." At first she refused to tell Laura what was wrong. Laura asked why she wouldn't tell. Autumn told her, "Because daddy said that you would make him leave and that he would beat my butt if I told you." After reassurance from her mother, Autumn said "daddy put his pee-pee in her pee-pee, and that daddy put his pee-pee in her butt, and daddy made her suck on his pee-pee like it was a sucker."

The next day, Laura confronted Bockting. She asked him to leave, which he did. Two days later, a Tuesday, Laura called the rape crisis hotline and was told to take Autumn to the hospital, where they were met by Detective Zinovitch. Zinovitch tried to interview Autumn, but she was too upset. A rape examination was performed. The doctor found that Autum's rectal sphincter had been torn within the past week. She also found that Autumn's hymenal ring was wide open, a rarity in a six-year old. The doctor determined that although she "couldn't determine what kind of instrument or foreign body was used to cause the laxness of the hymen and the fissure of the rectum," it had been caused by a blunt force. Two days later, Autumn was again interviewed by a detective. She repeated what she had told her mother, accurately describing the positions of the sex acts. She also demonstrated the acts with anatomically correct dolls.

At Bockting's preliminary hearing, Autumn was able to answer questions about the difference between the truth and a lie, but became upset when she was asked about being touched by Bockting. Upon further questioning, she said she could not remember what occurred with her father and did not remember whether she had talked with the detective about the

claimed assault. The judge declared Autumn an unavailable witness, and the preliminary hearing proceeded with the testimony of Laura and Zinovitch. At trial, the judge found that Autumn's hearsay statements were admissible because she was effectively unavailable for trial. Without having the opportunity to cross-examine Autumn, Bockting was convicted and sentenced to life in prison.

Bockting appealed to the Nevada Supreme Court, which dismissed his claims. The United States Supreme Court later vacated the Nevada Supreme Court's decision, remanding for consideration in light of *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). In 1993, the Nevada Supreme Court affirmed Bockting's conviction. He filed a second petition for post-conviction relief, which the state district court denied in 1994. Three years later, the Nevada Supreme Court again dismissed the appeal. Bockting then sought relief in federal court. He timely filed a habeas petition in 1998, which he amended in 2000. The district court denied the petition, and Bockting filed the present appeal.

II. DISCUSSION

Because Bockting filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), its provisions apply. *See Woodford v. Garceau*, 538 U.S. 202, 207, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). Under AEDPA, habeas relief to a state prisoner is available only if the state court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

The Supreme Court also directs us that "in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state." *See Horn v. Banks*, 536 U.S. 266, 272, 122 S. Ct. 2147, 153 L. Ed. 2d 301 (2002). Indeed, as the Court noted, "if our post-AEDPA cases suggest any-thing about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct." *Id.*

In explaining *Teague*'s application, the Supreme Court recently explained that there are three steps to determining whether a rule of criminal procedure applies on collateral review:

> First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed, and ask whether the Constitution, as interpreted by precedent then existing, compels the rule. That is, the court must decide whether the rule is actually "new." Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 542 U.S. 406, 124 S. Ct. 2504, 2510, 159 L. Ed. 2d 494 (2004) (internal citations omitted). Because Bockting's conviction became final in 1993, we must evaluate whether any subsequent rule of constitutional law is new against the benchmark of that year.

A. *CRAWFORD* ANNOUNCED A NEW RULE

The question before us is whether the Confrontation Clause principles stated in *Crawford* amount to a new rule. In *Crawford*, the Supreme Court considered whether Washington

State's use at trial of a witness's tape-recorded statement to a police officer violated the Confrontation Clause. 124 S. Ct. at 1357. Writing for the Court, Justice Scalia engaged in a lengthy historical analysis of the Confrontation Clause, noting that "the principal evil at which the Confrontation Clause was directed was the *civil-law mode of criminal procedure*, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 1363 (emphasis added). He went on to emphasize "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, *and* the defendant had had a prior opportunity for cross-examination." *Id.* at 1365 (emphasis added).

Whether the rule in *Crawford* is new depends on whether it "was *dictated* by the then-existing precedent." *Beard*, 124 S. Ct. at 2511. To be sure, the majority in *Crawford* is somewhat opaque as to the categorization of its ultimate holding. As the Court noted, "although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales." 124 S. Ct. at 1369. The puzzler is whether the "results of [the Supreme Court] decisions" are coextensive with the rules of those decisions. If so, then the *Crawford* pronouncement could be legitimately viewed as a continuation of Supreme Court jurisprudence. Careful scrutiny of the *Crawford* opinion suggests otherwise for at least two reasons: (1) *Crawford* deviates from the test announced in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); and (2) simply reaching the right "result" does not mean that the result flowed from a constant rule.

As the Court observed, "*Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears particularized

guarantees of trustworthiness." *Crawford*, 124 S. Ct. at 1369 (quoting *Roberts*, 448 U.S. at 66). *Roberts* rests on evidentiary principles of reliability and trustworthiness rather than on the constitutional principle of confrontation.

The *Crawford* majority quite clearly states that the *Roberts* "test departs from the historical principles" in that it is both "too broad" and "too narrow." *Crawford*, 124 S. Ct. at 1369. *Crawford* did not announce the same rule as *Roberts*. Whereas *Roberts* countenanced the admission of witness testimony if trustworthy, under *Crawford* the testimony is admitted only if the witnesses are subject to cross-examination. The Court concluded that the cases applying *Roberts* have "remained faithful to the Framers' understanding," *id.* at 1369, that testimonial statements are admissible only when two criteria are met: unavailability and opportunity for cross-examination. In other words, "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 1374. Although historical principles are the bedrock for the *Crawford* decision, getting back to the bedrock required the Court to disavow the *Roberts* test. The dissent in *Crawford* mirrors this view by concluding that "the Court of course overrules *Ohio v. Roberts*," *id.* at 1378, and criticizing the "Court's adoption of a new interpretation of the Confrontation Clause. . . . ," *id.* at 1374.

To say that the outcomes or "results" have been generally "faithful to the original meaning" is not the same as saying that there has been a consistent rule throughout our history. Indeed, the *result* in an individual case may well be consistent with the Supreme Court's new interpretation of *Crawford*, but that does not mean that the rule that dictated the prior result is necessarily consistent with *Crawford*. The majority in fact

underscores the dichotomy between outcomes and rules in announcing that, "if nothing else, the test we announce is an empirically accurate explanation of the results our cases have reached." *Id.* at 1369 n.9. Rules and outcomes are neither the same nor wholly overlapping.

Finally, the Court in *Crawford* pinpointed a situation that was, in fact, "arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial." *Id.* at 1368 n.8. Citing *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992), the Court described a case remarkably similar to ours, in which "statements of a child victim to an investigating police officer [were] admitted as spontaneous declarations." *Id. White* rested on the issue of the unavailability requirement under the Confrontation Clause; had *Crawford* been the rule at the time, the lack of cross-examination would have been fatal to the admission of the evidence.

Although the long line of Confrontation Clause cases is "faithful to the original meaning" of the clause, *id.* at 1369, we cannot overlook *Roberts* and *White*. On balance, an analysis of the historical application of the Confrontation Clause cases leads to the conclusion that *Crawford* announces a new rule that must be put through the *Summerlin* strainer. If, on the other hand, *Crawford* does not announce a new rule--the position taken by Judge Noonan--then the *Summerlin* analysis is not required. Either way, the result in this case is the same. Bockting's petition should be granted.

B. *SUMMERLIN* CONTROLS THE RETROACTIVITY ANALYSIS

Because *Crawford* announces a new rule, we must ask whether it falls into one of the two *Teague* exceptions to the

bar on retroactivity. The first *Teague* exception is for primary conduct that cannot be criminalized. The second is for bedrock rules of criminal procedure. *Teague*, 489 U.S. at 307. It is the second exception that is at play in this case.

The *Crawford* rule does not narrow the scope of a criminal statute by interpreting its terms, nor is it a constitutional determination that places particular conduct or persons covered by the statute beyond the State's power to punish. *Summerlin*, 124 S. Ct. at 2522. Rather, the rule in *Crawford* is procedural. *See also Crawford*, 124 S. Ct. at 1370 (stating the Confrontation Clause provides "a procedural rather than a substantive guarantee"). Therefore, *Crawford* merits retroactive application only if it implicates "the fundamental fairness and accuracy of the criminal proceeding," *Saffle v. Parks*, 494 U.S. 484, 495, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990), and reworks our understanding of bed-rock criminal procedure, *Sawyer v. Smith*, 497 U.S. 227, 242, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990).

To be sure, under *Summerlin*, the lower courts are tightly constrained in determining whether a new rule is a "watershed rule" that is not only fundamental, but one "without which the likelihood of an accurate conviction is seriously diminished." *Summerlin*, 124 S. Ct. at 2523 (quoting *Teague*, 489 U.S. at 313). Viewing *Crawford* and *Summerlin* together poses a conundrum. Justice Scalia wrote for the majority in both cases. In *Summerlin*, the Court admonished that "this class of [retroactive] rules is extremely narrow, and it is unlikely that any . . . has yet to emerge." 124 S. Ct. at 2523 (quoting *Tyler v. Cain*, 533 U.S. 656, 667 n.7, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001)) (internal quotations omitted). Nonetheless, the bar is not absolute and the *Crawford* rule meets the Court's criteria. Admonitions

such as in *Summerlin* offer discouragement but no guidance. Because our job is not to conjure up hidden meaning, we simply heed the warning and our analysis thus adheres faithfully to the holding and rationale of *Summerlin*. Viewing *Crawford* in light of *Summerlin* leads to the conclusion that the *Crawford* cross-examination requirement merits retroactive application.

That the *Crawford* requirement is fundamental to our legal regime is beyond dispute. Justice Scalia's eloquent recitation of the history, purpose, and place of the Confrontation Clause and cross-examination answers this question. *Crawford*, 124 S. Ct. at 1359. Hundreds of years of tradition have embedded this notion as a fundamental role. Indeed, "the Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." *Id.* at 1373.

The question next posed is whether the rule implicates the accuracy of the criminal proceeding. Juxtaposed, *Summerlin* actually underscores why the *Crawford* rule implicates the "fundamental fairness and accuracy of the criminal proceeding," *Saffle*, 494 U.S. at 495, and alters our understanding of bedrock procedural principles, whereas the sentencing scheme in *Summerlin* did not. In *Summerlin*, the Court concluded that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which held that aggravating factors in a death penalty case must be proved to a jury rather than to a judge, was not a retroactive rule. *Summerlin* asked "whether judicial factfinding so *seriously* diminishes accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Summerlin*, 124 S. Ct. at 2525 (citations and quotations omitted). The answer was no because "the evidence is simply too equivocal to support that conclusion." *Id.*

In *Summerlin*, the Court observed that "for every argument why juries are more accurate factfinders, there is another why they are less accurate."[1] In contrast, the

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[1] The Court rejected the notion that the jury trial right seriously impacted accuracy in part because the jury-free civil law system is so prevalent:

> "The mixed reception that the right to jury trial has been given in other countries . . . surely makes it implausible that judicial factfinding so *seriously* diminishes accuracy as to produce an impermissibly large risk of injustice." 124 S. Ct. at 2525 (internal quotations omitted).
>
> Unlike the "mixed reception that the right to jury trial has been given in other countries," *id.*, the right of confrontation is well established in international practice. Justice Scalia noted in *Crawford* that "the right to confront one's accusers is a concept that dates back to Roman times." *Crawford*, 124 S. Ct. at 1359. He then went on to chronicle the history in England. Although not mentioned in *Crawford*, it bears noting that the right of confrontation is firmly implanted in the jurisprudence of other European countries. For example, the European Convention on Human Rights, articles (6)(1) and (6)(3)(D), give the right "to examine or have examined witnesses against him." The European Court of Human Rights has established a right of confrontation: *Saidi v. France*, 17 Eur. Ct. H.R. 251, 270 (1993) ("Neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial"). *See also Van Mechelen v. Netherlands*, 25 Eur. Ct. H.R. 647, 673 (1997); *Ludi v. Switzerland*, 15 Eur. Ct. H.R. 173 (1992); *Windisch v. Austria*, 13 Eur. Ct. H.R. 281 (1990); *Delta v. France*, 16 Eur. Ct. H.R. 574 (1990); *Kostovski v. Netherlands*, 12 Eur. Ct. H.R. 434, 448-49 (1989).

evidence that cross-examination seriously decreases the possibility of inaccurate conviction is unequivocal.

The Supreme Court has repeatedly and without deviation held that the purpose of the Confrontation Clause is to promote accuracy. *See, e.g.*, *Crawford*, 124 S. Ct. at 1370 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth.") (quoting 3 Blackstone, Commentaries * 373); *White v. Illinois*, 502 U.S. 346, 355, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992) (evaluating a Confrontation Clause claim against the benchmark of accuracy); *Tennessee v. Street*, 471 U.S. 409, 415, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985) (describing the "Confrontation Clause's very mission" as "to advance the accuracy of the truth-determining process in criminal trials") (internal quotation omitted); *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (stating the purpose of the Confrontation Clause is to "augment accuracy in the factfinding process"); *Parker v. Randolph*, 442 U.S. 62, 73, 99 S. Ct. 2132, 60 L. Ed. 2d 713 (1979) (plurality) ("The right of confrontation conferred by the Sixth Amendment is a safeguard to ensure the fairness and accuracy of criminal trials."); *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ("The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'"); *Dutton v. Evans*, 400 U.S. 74, 89, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (plurality) ("The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials . . . ."); *Pointer v. Texas*, 380 U.S. 400, 404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) ("Probably no one, certainly no one experienced in the trial of lawsuits, would

deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case."); *Mattox v. United States*, 156 U.S. 237, 242-43, 15 S. Ct. 337, 39 L. Ed. 409 (1895) (describing the "primary object" of the Confrontation Clause as "to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief"). *See also* M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better") (quoted in *Crawford*, 124 S. Ct. at 1370).

But accuracy and reliability do not exist in a vacuum. Rather, "the central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. "The word 'confront,' after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). Even more to the point, the Court wrote, "the combined effect of these elements of confrontation--physical presence, oath, cross-examination, and observation of demeanor by the trier of fact--serves the purposes of the Confrontation Clause by *ensuring that evidence admitted against an accused is reliable* and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Id.* at 846 (emphasis added).

Crawford itself answers the question of whether the absence of cross-examination "so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach" *Summerlin*, 124 S. Ct. at 2525 (internal quotations omitted):

- "The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Crawford*, 124 S. Ct. at 1371.

- "The [general reliability] test is *inherently*, and therefore *permanently*, unpredictable. *Id.* at 1374 n.10. "It is difficult to imagine [the general reliability framework] providing any meaningful protection in [politically charged cases]." *Id.* at 1374.

- "We view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." *Id.* at 1373.

Thus, at the heart of the Court's concerns in *Crawford* was the *reliability* of admitted evidence. Where admitted evidence is unreliable, the accuracy of convictions is seriously undermined. That the rule in *Crawford* is one without which the accuracy of convictions would be seriously undermined is further born out by the Court's own description of its prior doctrine as a "rare case" of "fundamental failure." *Id.* at 1373. The difference between pre- and post-*Crawford* Confrontation Clause jurisprudence is not the sort of change that can be dismissed as merely incremental. Instead, it is an

"absolute pre-requisite to fundamental fairness." *Sawyer*, 497 U.S. at 244.

In *Crawford*, the Court itself faults the previous regime under *Roberts*. *Crawford*, 124 S. Ct. at 1371-73. Indeed, to benchmark reliability against *Roberts* would undermine *Crawford*'s central thesis. Reliance on *Roberts*' judicially-administered reliability test gives illusory comfort, as "the [Confrontation] Clause . . . reflects a judgment . . . about how reliability can best be determined," *id.* at 1370, and "the legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception," *id.* at 1371.[2]

The retroactivity inquiry is not conducted in a vacuum. Rather, the analysis is modeled on the *Summerlin* requirements. But even if a "look back" to *Roberts* were appropriate, as Judge Wallace suggests, *Crawford* would be retroactive.

Rules that are properly considered retroactive are those that "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) (internal quotations omitted). As the Court recently stated, "in providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)." *Beard*, 124 S. Ct. at 2514 (citing

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[2] Judge Wallace's effort to rest the analysis on the reliability test under *Roberts* forces a false dichotomy between reliability and cross-examination and overlooks the fact that "some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial." *Id.* at 1372.

Saffle, 494 U.S. at 495, *Gilmore v. Taylor*, 508 U.S. 333, 364, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993) (Blackmun, J., dissenting)). Recognizing that bedrock procedural rules are very few in number, it is no leap to conclude that the right of cross-examination as an adjunct to the constitutional right of confrontation joins the very limited company of *Gideon*.

We join one other circuit that has concluded that *Crawford* announces a new rule, although its retroactivity analysis differs from ours. *See Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004). The Second Circuit did not directly address the new rule issue but concluded that even if *Crawford* did announce a new rule, it would not be retroactive. *Mungo v. Duncan*, 393 F.3d 327, 336 (2d Cir. 2004).

Addressing the question of a new rule, the Tenth Circuit reasoned as follows:

> As we explained above, prior to the decision in *Crawford*, *Roberts* provided the appropriate framework for determining whether the admission of hearsay statements violated the Confrontation Clause. The Supreme Court itself noted that the logic of *Roberts* was inconsistent with the Court's conclusion in *Crawford* that the Confrontation Clause requires an opportunity to cross-examine before testimonial hearsay may be admitted against the defendant. Crawford, 541 U.S. 36 , 124 S. Ct. at 1369. Thus, *Roberts* and its progeny did not dictate the result in *Crawford* and we conclude that it announces a new rule of constitutional law. *See Crawford*, at ___, 124 S. Ct. at 1374 (Rehnquist, C.J., dissenting) (referring

> to the majority's holding as a "new interpretation of the Confrontation Clause").

Brown, 381 F.3d at 1226. Our analysis is in accord.

But the Tenth Circuit diverges from us in holding that *Crawford* is not retroactive because it does not set forth a watershed rule of criminal procedure. *Id.* Stating that unless a new rule is "on the magnitude of the rule announced in *Gideon v. Wainright*," it will not fit within the *Teague* watershed rule exception, the court explained:

> Unlike *Gideon*, *Crawford* does not 'alter[] our understanding of what constitutes basic due process,' but merely sets out new standards for the admission of certain kinds of hearsay. Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial. It would, therefore, be difficult to conclude that the rule in *Crawford* alters rights fundamental to due process.

Id. at 1226-27 (internal citations omitted).

The Supreme Court's Confrontation Clause jurisprudence in *Crawford* cannot be dismissed as a mere tweak on the admissibility of hearsay. *See Brown*, 281 F.3d at 1226. The Supreme Court surely did not conceive of it as such. Rather, the Court describes the right of confrontation as a "bedrock procedural guarantee," notes that it "dates back to Roman times" and was part of the common law known to the founding generation. *Crawford*, 124 S. Ct. at 1359. The Court also contrasts "exclusion under the hearsay rules" with "the civil-law abuses the Confrontation Clause targeted." *Crawford*, 124 S. Ct. at 1364. In a rare *mea culpa*, the Court

faults itself for not enunciating the *Crawford* rule earlier, stating that "it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." *Id.* at 1373. There is nothing "mere" about the *Crawford* rule.

The Tenth Circuit mistakenly concluded that rules of constitutional law subject to harmless error review can never be considered bedrock rules of procedure. The two inquiries hinge on different questions. Whether a rule is a bedrock rule of procedure depends on whether it increases the likelihood of accurate conviction. *Summerlin*, 124 S. Ct. at 2523. Whether a rule is subject to harmless error analysis depends on whether the impact of the error can be measured. *See Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Therefore, a rule of constitutional law could be essential to promote accurate convictions, but still subject to harmless error review if the impact of misapplication of the rule were easily measurable. In short, because accuracy and measurability are different concepts, whether a rule of constitutional law is subject to harmless error review does not answer the question whether it is a bedrock rule of procedure.

After assuming that *Crawford* announced a new rule, the Second Circuit rejected retroactivity, reasoning that the *Crawford* rule would not improve overall accuracy because "it is likely to improve accuracy in some circumstances and diminish it in others." *Mungo*, 393 F.3d at 335. The flaw in this analysis is that the Second Circuit has substituted its judgment of whether the *Crawford* rule is one without which the accuracy of conviction is seriously diminished, for the Supreme Court's considered judgment. The Court has found repeatedly that the purpose of the Confrontation Clause is to promote accuracy, *see, e.g.*, *Tennessee v. Street*, 471 U.S.

409, 415, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985), and thus *Crawford* rejected the *Roberts* framework as reflective of "a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion," *Crawford*, 124 S. Ct. at 1373. Viewing these holdings together leads to the conclusion that the *Crawford* rule is one without which the likelihood of accurate conviction is seriously diminished.

C. BOCKTING MERITS RELIEF UNDER AEDPA

Having determined that *Crawford* is retroactive, the remaining task is to determine whether, under AEDPA, the Nevada Supreme Court's analysis was either "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1)-(2). The Supreme Court has yet to address directly whether AEDPA was intended or should be read to adopt the *Teague* exceptions. *Williams v. Taylor*, 529 U.S. 362, 380, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (Stevens, J., for four justices) ("AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final."). Application of *Teague* is the means by which new rules are made retroactive. As noted earlier, the Court has clarified that the *Teague* and AEDPA inquiries are separate. *Horn*, 536 U.S. at 272. But in directing us to undertake both inquiries in an AEDPA case, the Court has impliedly endorsed the application of *Teague* in the AEDPA context. Further, it appears that Congress intended to preserve the *Teague* exceptions because AEDPA explicitly provides for their application in proceedings involving state habeas petitions. *See* 28 U.S.C. § 2254(e) ("If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an

evidentiary hearing on the claim unless the applicant shows that . . . the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.") But even if Congress' intent is unclear, the constitutional doubt cannon of construction mandates that we read the statute to incorporate the *Teague* exceptions to avoid the serious constitutional problem raised by depriving individuals of bedrock principles of Due Process. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

The Nevada Supreme Court relied on *Roberts* to conclude that Autumn was "unavailable" and that her statements bore the requisite "particularized guarantees of trustworthiness." *Bockting v. State*, 109 Nev. 103, 847 P.2d 1364, 1367-70 (Nev. 1993). As we now know, but the Nevada Supreme Court could not have divined, *Crawford* dictates the right to cross-examine the witness. The progeny of *Roberts*, such as the multi-factor reliability test developed in *Idaho v. Wright*, 497 U.S. 805, 821-22, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (9th Cir. 1990), cannot override the right of confrontation. Thus, the Nevada Supreme Court's decision was "contrary to" established Supreme Court precedent in *Crawford*, as made retroactive under *Teague* and *Summerlin*.

It bears noting that *Crawford* requires not only cross-examination but unavailability. We have long acknowledged the sensitive situation presented by the child witness. *See, e.g., Tome v. United States*, 513 U.S. 150, 166, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995). Indeed, prosecutions for child abuse often rely heavily on such testimony. Here, the trial court's inquiry into Autumn's unavailability was truncated and conclusory at best. When she refused to cooperate, the court simply declared her unavailable. Although this issue is

troubling, it is not necessary to reach this question because of the constitutional error related to the lack of cross-examination.

The final question is whether admission of Autumn's statement is harmless beyond a reasonable doubt. *See Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The detective's testimony regarding Autumn's interview was a critical piece of evidence, particularly in view of Autumn's inconsistent testimony at the preliminary hearing. Even if her statement to the mother was, for argument's sake, considered admissible, the detective's description of Autumn's interview was so significant that the error could have materially affected the verdict. Thus, admitting Autumn's statement was not harmless beyond reasonable doubt.

III. CONCLUSION

Because a majority concludes that *Crawford* must be applied in this pending habeas case, Bockting's petition for a writ of habeas corpus is GRANTED.[3]

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[3] I join part II of Judge Wallace's concurring and dissenting opinion with respect to admission of prior misconduct, vouching, and ineffective assistance of counsel.

CONCURRENCE

NOONAN, Circuit Judge, concurring:

The trial court, the state supreme court, and the federal district court believed that the statute was constitutional, the procedure followed to have been proper, and Bockting's conviction valid. It is now apparent that each of these courts was mistaken and that the statute and the procedure under it are unconstitutional. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Bockting is entitled to a writ of habeas corpus. The misunderstanding of the law governing the case is comprehensible in the light of the history set out in *Crawford*; nontestimonial hearsay is not subject to an absolute bar. "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374.

Autumn was not found to be as unavailable as a witness. She was in fact present at the trial. At most, the Nevada courts determined that Autumn was not willing to be a witness against Bockting. The reasons for her unwillingness were not explored. The possibility of measures short of appearance on the stand in open court were not explored. The fact that she had testified at Bockting's preliminary hearing and had denied the accusations against him was ignored. On the mere ipse dixit of a prosecutor already disappointed by Autumn's testimony at the preliminary hearing, she was disqualified as a witness and the hearsay introduced. The Confrontation Clause of the Sixth Amendment to the Constitution of the United States, applicable by virtue of the Fourteenth Amendment, was violated.

No opportunity for cross-examination by Bockting ever existed. He was, of course, not present when Autumn spoke to her mother or when she spoke to Detective Zinovitch. Totally untested by the method constitutionally required, the two testimonial tales, retold by Laura and the detective, confronted Bockting at his trial. The Confrontation Clause demanded that he be confronted with the witness against him. U.S. Const. amend. VI.

It is a work of supererogation to praise the wisdom of the Founders and to celebrate the enforcement of a "bedrock procedural guarantee." *Crawford*, 124 S. Ct. at 1359. Nonetheless, the circumstances of this case demonstrate how wise it is to exclude testimony untested by cross-examination. Autumn's first declaration, reported only by her mother, was made at night after Autumn awoke from sleep crying and was questioned by her mother. It may have been an excited or spontaneous utterance but one made under circumstances rendering it less, not more credible. In her mother's words, "She looked like she had just woke up from a bad dream and she was quite upset." It is a commonplace phenomenon for people of all ages to have nightmares and to awake in distress. What they then say was bothering them carries no guarantee of trustworthiness; they are coming out of sleep, still responding to their sleeping state impressions. Autumn's second declaration was made to a police officer in the presence of her mother; she was under psychological compulsion not to let her mother down. As to her play with the dolls and her sexual experience, her mother testified that Autumn had observed her and Bockting having sexual intercourse in the one bedroom trailer in which the family lived and where Autumn slept in a closet area off the bedroom. The language Autumn used in reference to the sexual organs was language her mother testified that she used in discussion with her. Autumn had no motive to accuse her

stepfather of criminal assault and, in fact, demonstrated affection for him; she did have a motive to account for her nightmare and to tell the same story the second time when she met the police.

Autumn's statements were further put in doubt by her repudiation of any accusation against Bockting at his preliminary hearing. Further, the report of her statement of her mother must be contextualized by these facts: her mother was an exotic dancer, who sometimes performed in front of Autumn; her mother was in conflict with Bockting and on the brink of leaving him; her mother did not report Autumn's nighttime declaration until two days after she said she heard it.

It is argued that to apply *Crawford* is to apply it retroactively. To the contrary, the Supreme Court, after reviewing its own decisions, declared:

> Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

Crawford, 124 S. Ct. at 1369. *Crawford*, therefore, does not announce a new rule. Retroactivity is not an issue.

True, the chief justice's dissent declared that *Crawford* was "a new interpretation" that overruled *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). *Id.* at 1374. But as the Court pointed out, *Roberts* itself only admitted testimony that had been subjected to cross-examination. *Id.* at 1368. Undoubtedly, a number of courts misinterpreted the Confrontation Clause in the same way as

the Nevada courts did. But correction of a misinterpretation does not create a new rule. It is dangerous to take literally a dissent. The authentic interpretation of what the Court is doing comes from the Court itself. If there were any doubt in this case (which I deny there is), it is completely dispelled by the Court, again speaking through the author of *Crawford* in the same term in which *Crawford* was decided. Addressing new procedural rules without which the likelihood of an accurate conviction is seriously diminished, the Court declared: "This class of rules is extremely narrow and it is unlikely that any . . . has yet to emerge." *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 2522, 159 L. Ed. 2d 442 (2004) (quoting *Tyler v. Cain*, 533 U.S. 656, 667 n.7, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001)) (alterations and quotation marks omitted). This declaration is an authoritative determination, delivered less than four months after *Crawford*, that *Crawford's* bedrock procedural rule was not a new rule. A change in rationale is not treated by the Supreme Court as a change in rules. *Crawford*, 541 U.S. 36, 124 S. Ct. 1354 at 1369, 158 L. Ed. 2d 177. All along, the bedrock was there.

As an alternative to the foregoing analysis and in order to provide a precedent for this court, I also concur in Judge McKeown's analysis and opinion.

Because the action of the Nevada Supreme Court resulted in a decision that was contrary to established federal law as determined by the Supreme Court of the United States, 28 U.S.C. § 2254(d)(1), the writ of habeas corpus should issue to free Bockting from his unconstitutional confinement.

DISSENT

WALLACE, Senior Circuit Judge, concurring and dissenting

Both Judges McKeown and Noonan conclude that the Supreme Court's recent landmark decision, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), governs our consideration of Bockting's Confrontation Clause claim, although for different reasons. While Judge Noonan would hold that retroactivity is "not an issue" because *Crawford* did not establish a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), *Ante* at 2015, I concur with that part of Judge McKeown's opinion holding that *Crawford* established a new rule that does not apply retroactively to state convictions on habeas review unless it satisfies one of two narrow exceptions. However, I do not agree that *Crawford* fits within either of those exceptions. Guided by the principles outlined in *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), I would hold that *Crawford's* new procedural rule does not qualify for retroactive application and would analyze Bockting's Confrontation Clause claim under pre-*Crawford* jurisprudence. In doing so, I would reject that claim, as well as Bockting's remaining claims, under the deferential standards of review embodied in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and affirm

the district court's denial of Bockting's habeas petition.[1] I therefore respectfully dissent.

I.

I consider first Bockting's contention that the state trial court violated his rights under the Confrontation Clause by admitting Autumn's out-of-court statements.

A.

Several weeks after this case was argued before us and submitted for decision, the Supreme Court issued *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Parting ways with the constitutional test formulated in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), *Crawford* held that in criminal proceedings, "testimonial statements of witnesses absent from trial [are admissible] only where the defendant is unavailable, and *only where the defendant has had a prior opportunity to cross-examine*." *Crawford*, 124 S. Ct. at 1369 (emphasis added).

Bockting argues--and Judge Noonan agrees--that *Crawford* does not raise retroactivity concerns at all because it does not qualify as a "new rule" under *Teague*. Although the Supreme Court took great pains to harmonize *Crawford's* result with previous Sixth Amendment decisions, I agree with Judge McKeown that *Crawford's ratio decidendi* effected a clear

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[1] Judge McKeown concurs in part II of this opinion. *See* Ante at 2012 n.3. Therefore, a majority of the court agrees that Bockting's challenges to (a) the admission of evidence of prior misconduct, (b) vouching, and (c) effective assistance of counsel, do not warrant habeas relief.

and decisive break from prior precedent. *See Crawford*, 124 S. Ct. at 1369 (observing that "although the results of our decision have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales"). Before *Crawford*, controlling precedent permitted courts to admit hearsay evidence against a criminal defendant whenever the declarant was "unavailable" and the evidence had "adequate 'indicia of reliability,'" i.e., fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66. *Crawford*, however, emphatically rejected *Roberts's* approach to testimonial evidence, arguing that its test demonstrated an "unpardonable . . . capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." 124 S. Ct. at 1371. As the Court in *Crawford* explained:

> [*Roberts*] is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability.

Id. at 1369. Responding to these concerns, the Court limited *Roberts's* reach to cases "where nontestimonial hearsay is at issue." *Id.* at 1374. In cases involving "testimonial evidence," the Court replaced *Roberts* with a new test that has two requirements: "unavailability and a prior opportunity for cross-examination." *Id.* Thus, since *Crawford* overruled *Roberts's* test for the admission of testimonial evidence, the decision also represents a "new rule" for retroactivity purposes. *See id.* at 1378 (Rehnquist, C.J., concurring)

(characterizing the majority's opinion as a "new rule"); *Graham v. Collins*, 506 U.S. 461, 467, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) ("There can be no dispute that a decision announces a new rule if it expressly overrules a prior decision . . . ."); *Teague*, 489 U.S. at 301 ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.").

Crawford's "new" constitutional rule would only apply retroactively to final convictions on collateral review if it falls within certain categories of rules. The Supreme Court recently clarified the nature and scope of these categories in *Summerlin*:

> New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him.
>
> New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "'watershed rules of criminal procedure'

> implicating the fundamental fairness and accuracy of the criminal proceeding."

124 S. Ct. at 2522-23 (citations omitted), *quoting Bousley v. United States*, 523 U.S. 614, 620, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998), *and Saffle v. Parks*, 494 U.S. 484, 495, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990).

Measured against *Summerlin's* standards, *Crawford* is best classified as a procedural rule. The rule does not "narrow the scope of a criminal statute by interpreting its terms"; nor does it "place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 2522. Rather, by renegotiating the boundaries between admissible and inadmissible evidence, *Crawford* operates solely on a defendant's criminal *proceedings*. *Crawford's* characterization as a procedural rule is further supported by the *Crawford* decision itself. By labeling the Confrontation Clause as "a procedural rather than a substantive guarantee . . . [that] reflects a judgment . . . about how reliability [of testimonial evidence] can best be determined," the Court endeavored to reinstitute "the constitutionally prescribed *method* of assessing reliability." *Crawford*, 124 S. Ct. at 1370 (emphasis added). While, the line between "substance" and "procedure" may not always be crystal-clear, there can be no serious dispute that *Crawford's* restriction on testimonial evidence is a "procedural" rule.

Bockting contends that *Crawford* merits retroactive application here because it is a "'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495, *citing Teague*, 489 U.S. at 311; *see also Teague* 489 U.S. at 307 (describing this exception as applying to "those procedures that . . . are implicit in the concept of ordered liberty"

(quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937))). This argument--which Judge McKeown finds persuasive--admittedly has some intuitive appeal; as Bockting observes, the Supreme Court has described "the Sixth Amendment's right of an accused to confront the witnesses against him" as "fundamental," *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), and *Crawford* purports to effectuate the Confrontation Clause's original design and thereby enhance the fairness and accuracy of defendants' criminal proceedings. *Crawford*, 124 S. Ct. at 1373. However, the fact that *Crawford* is "'fundamental' in some abstract sense is not enough" to entitle Bockting to habeas relief. *Summerlin*, 124 S. Ct. at 2523. Under *Teague* and its progeny, *Crawford* does not constitute a "watershed rule" suitable for retroactive application unless the *Roberts* test "so '*seriously* diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach." *Id.* at 2525, *quoting Teague*, 489 U.S. at 312-13; *see also id.* at 2523 ("This class of rules is extremely narrow, and 'it is unlikely that any . . . ha[s] yet to emerge.'" (*quoting Tyler v. Cain*, 533 U.S. 656, 667 n.7, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001)) (internal quotation marks and citation omitted)).

In evaluating the *Roberts* test, the Supreme Court's analysis in *Summerlin* is instructive. The question presented there was whether *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Court's decision that juries must determine the existence of any aggravating factor necessary for imposition of the death penalty, applied retroactively to cases already final on direct review. In assessing whether *Ring* represented a true "watershed" procedural rule, the court reviewed scholarly commentary relating to the accuracy of judicial factfinding and concluded that the evidence was "simply too equivocal" to justify *Ring's*

retroactive application: "when so many presumably reasonable minds continue to disagree over whether juries are better factfinders . . ., we cannot confidently say that judicial factfinding *seriously* diminishes accuracy." *Summerlin*, 124 S. Ct. at 2525. The Court also stressed that this conclusion followed logically from its observation in *DeStefano v. Woods*, 392 U.S. 631, 88 S. Ct. 2093, 20 L. Ed. 2d 1308 (1968) (per curiam), "that, although 'the right to jury trial generally tends to prevent arbitrariness and repression[,] . . . we would not assert . . . that every criminal trial--or any particular trial--held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.'" *Summerlin*, 124 S. Ct. at 2525, *quoting DeStefano*, 392 U.S. at 633-34 (internal quotation marks omitted). The Court reasoned that if "a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be." *Id.* at 2526. *Summerlin* thus did not extend *Ring* retroactively to cases on habeas review notwithstanding the Court's recognition that "the right to jury trial is fundamental to our system of criminal procedure." *Id.*

Although *Summerlin* does not directly control the outcome of this case, the close similarities between the two cases are compelling. As in *Summerlin*, there is no clear consensus over the comparative effects *Roberts* and *Crawford* might have on the accuracy of jury verdicts, *see Crawford*, 124 S. Ct. at 1377-78 (Rehnquist, C.J., concurring), much less any evidence that *Roberts* "so '*seriously* diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach," *Summerlin*, 124 S. Ct. at 2525, *quoting Teague*, 489 U.S. at 312-13. Nor am I prepared to assert that all testimonial hearsay evidence admitted without the opportunity for cross-examination necessarily renders a criminal trial "impermissibly

inaccurate," *id.* at 2526, or otherwise "unfair," *id.* at 2525, *quoting DeStefano*, 392 U.S. at 634. Even assuming *Crawford's* reinterpretation of the Confrontation Clause is in some sense "fundamental" and accuracy-enhancing, it does not follow that "the values implemented by [that] right . . . would . . . measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right" as it is currently understood. *Summerlin*, 124 S. Ct. at 2525-26, *quoting DeStefano*, 392 U.S. at 634. There is simply no solid evidence that *Roberts* has so seriously undermined the accuracy of criminal proceedings as to discredit the host of final convictions generated pursuant to its authority.

Judge McKeown, however, concludes that *Crawford* is retroactive, because "the evidence that cross-examination seriously decreases the possibility of inaccurate conviction is unequivocal." *Ante* at 2003-04. In her view, "*Crawford* itself answers the question of whether the absence of cross-examination "so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Ante* at 2003, *quoting Summerlin*, 124 S. Ct. at 2525. But that is the wrong question. Prior to *Crawford*, courts may not have been required to exclude an unavailable witness's out-of court testimonial statement that was not was subject to cross-examination, but they were required to exclude statements that did not have "adequate indicia of reliability." *Roberts*, 448 U.S. at 66. Thus, the question is not whether testimony that has been subject to cross-examination is more likely to be reliable than testimony that has not. Rather, the question is whether testimony admissible under *Roberts* is so much more unreliable than that admissible under *Crawford* that the *Crawford* rule is "one without which the likelihood of an accurate conviction is *seriously*

diminished." *Summerlin*, 124 S. Ct. at 2523 (internal quotation marks omitted).

The Supreme Court's decision in *Sawyer v. Smith*, 497 U.S. 227, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) illustrates the principle that a new rule qualifies as a "watershed rule[] of criminal procedure," *Teague*, 489 U.S. at 311, only if it represents a substantial improvement over the previously existing rule. In *Sawyer*, the Court addressed the question whether a habeas petitioner could claim the benefit of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), which was decided after the petitioner's conviction became final and which "held that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests else-where." *Sawyer*, 497 U.S. at 233. After concluding that *Caldwell* established a "new rule," *id.* at 233-41, the Court addressed whether *Caldwell* fit within either of *Teague*'s exceptions. But, in addressing whether *Caldwell* qualified as a "'watershed rule[] of criminal procedure,'" *id.* at 241, *quoting Saffle*, 494 U.S. at 495, the Court did not simply ask whether sentences imposed in violation of *Caldwell* were much less accurate than those imposed in compliance with *Caldwell*. Rather, the Court compared *Caldwell* against "the rule of [*Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974), which] was in place [at the time of the petitioner's trial and appeal] to protect any defendant who could show that a prosecutor's remarks had in fact made a proceeding fundamentally unfair." *Sawyer*, 497 U.S. at 243. Although the Court's "concern in *Caldwell* was with the 'unacceptable risk' that misleading remarks could affect the reliability of the sentence," *Caldwell* had merely been "added to an existing guarantee of due process protection against

fundamental unfairness." *Id.* at 244. Thus, the Court in *Sawyer* could not say that *Caldwell*'s "systemic rule enhancing reliability is an 'absolute prerequisite to fundamental fairness,' of the type that may come within *Teague*'s second exception." *Id.*, *quoting Teague*, 489 U.S. at 314.

Here, too, *Crawford*'s new rule must be judged against the background in which it was decided, by comparing it to the rule of *Roberts*. Although certain language in Judge McKeown's opinion suggests that she purports to do so, *see Ante* at 2007 ("The difference between pre- and post-*Crawford* Confrontation Clause jurisprudence is not the sort of change that can be dismissed as merely incremental."), she never actually asks the question upon which *Crawford*'s retroactivity turns: Does the admission of testimony which has been judicially determined to bear "adequate indicia of reliability" (as *Roberts* required), but which has not necessarily been subject to cross-examination (as *Crawford* requires), "so *seriously* diminish[] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach"? *Summerlin*, 124 S. Ct. at 2525 (internal quotation marks omitted). As explained above, the answer to that question should not be in the affirmative.

Yet another flaw in Judge McKeown's analysis is her focus on language in *Crawford* suggesting that the new rule announced in that case is truer to the Framers' design. For example, she quotes the Court's statement that "the Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." *Crawford*, 124 S. Ct. at 1373. *See Ante* at 2003. "The question here is not, however, whether the Framers believed that [cross-examination provides a] more accurate [means of testing the reliability of

testimony] than [judicial determinations of 'reliability' pursuant to *Roberts*]," but "whether [the *Roberts* test] so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Summerlin*, 124 S. Ct. at 2525 (internal quotation marks omitted). That the Framers made a particular judgment about the best way to ensure the reliability of testimony does not mean that any rule other than the one they envisioned creates an impermissibly high risk of inaccurate conviction.

The focus of Justice Scalia's analysis in *Crawford* was on *Roberts*' fidelity to the Framers' intentions, rather than the accuracy of convictions obtained under the *Roberts* regime. *See, e.g.*, *Crawford*, 124 S. Ct. at 1359 ("Petitioner argues that [the *Roberts*] test strays from the original meaning of the Confrontation Clause and urges us to reconsider it."); *id.* at 1369 ("Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales."); *id.* at 1370 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"). True, the Court stated that "the [Confrontation] Clause . . . reflects a judgment . . . about how reliability can best be determined," *id.* at 1370; that "the legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception," *id.* at 1371; and even that "reliability is an amorphous, if not entirely subjective, concept." *Id.* But, even if one assumes that the Framers were correct as an empirical matter that cross-examination is the best way to ensure the reliability of testimony, that does not mean that any other method impermissibly threatens punishing the innocent.

Finally, Judge McKeown's analysis is contrary to that of three other circuits that have held that *Crawford*'s rule does not fit within either of *Teague*'s exceptions. *See Brown v. Uphoff*, 381 F.3d 1219, 1225-27 (10th Cir. 2004); *Evans v. Luebbers*, 371 F.3d 438, 444-45 (8th Cir. 2004); *Mungo v. Duncan*, 393 F.3d 327, 335-36 (2d Cir. 2004). Although Judge McKeown criticizes *Brown* on the ground that "the Tenth Circuit mistakenly concluded that rules of constitutional law subject to harmless error review can never be considered bedrock rules of procedure," *see Ante* at 2009, that attack is not well-founded. Our own decision in *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002), which held that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) does not apply retroactively, employed the very reasoning that Judge McKeown finds objectionable. *See Sanchez-Cervantes*, 282 F.3d at 670 ("By applying harmless error analysis or plain error review to *Apprendi* claims, we have necessarily held that *Apprendi* errors do not render a trial fundamentally unfair. Therefore, it would seem illogical to hold that such an error is a watershed rule that 'implicate[s] the fundamental fairness of the trial'" (quoting *Teague*, 489 U.S. at 312) (footnote omitted)). The Tenth Circuit's reasoning in *Brown* is entirely consistent with our own in *Sanchez-Cervantes*, and provides yet another reason why Judge McKeown's analysis is unpersuasive.

For the foregoing reasons, I conclude that *Crawford* does not qualify as a "watershed rule[] of criminal procedure" appropriate for retroactive application to convictions already final on direct review. *Teague*, 489 U.S. at 311. Like the Second Circuit in *Mungo*, *see* 393 F.3d at 334-35, and unlike Judge McKeown, *see* Ante at 2010-11, I therefore would not reach the question whether AEDPA "nullifies" the *Teague* exceptions, such that no "new rule"--even one fitting within

one of those exceptions--may serve as the basis for habeas relief.

Nonetheless, to determine whether I can concur in the result, I must evaluate Bockting's Confrontation Clause claim according to the standards articulated in *Roberts* and our own pre-*Crawford* decisions.

B.

Because Judge McKeown's opinion does not get to the application of pre-*Crawford* law to Bockting's Confrontation Clause claim, it was not necessary for her to go into detail regarding the facts of this case that are relevant to such analysis, therefore I add them here.

At Bockting's March 30, 1988, preliminary hearing, Laura described Autumn's abuse allegations and other events leading up to Bockting's arrest. Prosecutors then called Autumn to the stand. Autumn testified that she knew the difference between the truth and a lie and answered preliminary questions about the alleged assault and subsequent rape examination. As the prosecutor probed more deeply into the details of Bockting's alleged assault, Autumn began to cry and averred that she could not remember basic facts such as what occurred in the bathroom with her father and whether she discussed her father's alleged assault with Detective Zinovitch. The judge asked Laura to take a seat next to Autumn on the witness stand, and Laura encouraged Autumn to "be honest" and "tell the truth." Responding that "you already told them," Autumn refused to answer any further questions. The judge declared Autumn unavailable as a witness.

Bockting's jury trial commenced on August 15, 1988. The government, represented by Deputy District Attorney John Lukens, called Autumn as its first witness. The trial transcript reads as follows:

> The Court: Very good then. Mr. Lukens, your first witness.
>
> Mr. Lukens: Autumn Bockting.
>
> ***
>
> The Court: How are you doing, Autumn? Autumn, you okay? All right. Continuation of case C83110, State of Nevada versus Marvin Howard Bockting. The record will reflect the presence of defendant; his counsel, Mr. Blaskey; Mr. Lukens representing the State[;] the absence of the jury. And we have on the stand Autumn Jean Tresler Bockting.
>
> All right. Go ahead, counsel.
>
> Mr. Lukens: Autumn, this is when you have to stand up to be sworn.
>
> The Court: Can you stand up, Autumn? Can you stand up and raise your hand for me? Autumn, stand up now and raise your hand for us, okay.
>
> Mr. Lukens: Your Honor, I think under these conditions. I think that the witness is unable to testify. The Court: Well, I think it is apparent without the jury if we can't get anything more than this, it is not likely when the jury is here we will do any better. Go ahead and assist, will you please.

Counsel approach the bench, please.

(Discussion at the bench which was not reported.)

Mr. Lukens: Your Honor, at this time since the Court has observed for itself the inability of Autumn Bockting to testify due to the emotional conflict that goes on within her, the State intends pursuant to [Nevada Revised Statute] 51.385 to offer into evidence the statements made by Autumn Bockting to both her mother, Laura, and Detective Zinovitch and, to a more limited extent, Diane Donovan.

This offer is made pursuant to [Nevada Revised Statute] 51.385 which states in pertinent part that, "In addition to any other provision for admissibility, a statement made by a child under the age of 10 years, describing any act of sexual conduct performed with or on the child, is admissible in a criminal proceeding regarding that sexual conduct if, A, the Court finds in hearing outside the presence of the jury that the time, content and circumstances of the statement provides sufficient circumstantial guarantees of trustworthiness, and, B, the child testifies at the proceeding or is unavailable or unable to testify." I submit that portion B has been met.

And, in addition, under [the provision formerly designated] Subsection [2], it says, "If the child is unavailable or unable to testify, written notice must be given to the defendant 10 days before the trial if the prosecution intends to offer the statements in evidence."

> I would submit that the State has complied with that and that such notice was filed on August 2nd, 1988 and is styled Notice Pursuant to [Nevada Revised Statute] 51.385 wherein I gave notice of the three individuals who I intend to call as to Autumn's statements.
>
> The Court: Very well. . . .

After hearing testimony from Laura and Detective Zinovitch outside the presence of the jury, the judge concluded that Autumn's hearsay statements were admissible under Nevada Revised Statutes 51.385 because Autumn was effectively unavailable for questioning:

> The very purpose of this statute was to avoid the problem we have here today where a little girl either is not willing to testify or for some reason is unable to or testifies in such an inconsistent manner that it means, in essence, that their testimony is worthless; and because of the fact that she is testifying in open court in front of strangers with all the things that surrounds that kind of a setting. . . . The little girl is obviously unavailable. And as far as these two statements, I am meaning the one to the mother and the one to Detective Zinovitch, I think they are allowed--they are credible enough to be allowed to be related to the jury.

Roberts outlines two preconditions for the introduction of out-of-court statements against a criminal defendant. First, the government must establish the declarant's "unavailability" to testify as a witness at trial. *Bains v. Cambra*, 204 F.3d 964, 973 (9th Cir. 2000), *citing* *Roberts*, 448 U.S. at 65-66. Second, the government must demonstrate that the hearsay

statements bear "adequate indicia of reliability" by showing that they either fall "within a firmly rooted hearsay exception" or contain "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 65-66. In Bockting's state proceedings, the Nevada Supreme Court determined that the government satisfied these two requirements, *see Bockting v. State*, 109 Nev. 103, 847 P.2d 1364, 1366-70 (Nev. 1993) (per curiam), and Bockting challenges these determinations on federal habeas review. Mindful of a federal court's duty to defer to the state supreme court's factual determinations and reasonable applications of Supreme Court precedent, 28 U.S.C. § 2254(d)(1)-(2), I consider each *Roberts* requirement in turn.

1.

Bockting first asserts that the Nevada Supreme Court's decision is not entitled to deference under AEDPA because the court failed to review whether Autumn was available to testify at trial. The record does not support this characterization of the state supreme court's findings. When Autumn refused to cooperate as a trial witness, the prosecution moved to introduce her hearsay statements through the testimony of her mother, Detective Zinovitch, and Doctor Donovan pursuant to Nevada Revised Statute 51.385, which provides for the introduction of a child's hearsay statements if they are "unavailable or unable to testify." NEV. REV. STAT. 51.385. Before granting the prosecution's motion, the trial court made a clear, particularized finding that Autumn's refusal to cooperate on the stand had rendered her "obviously unavailable." The Nevada Supreme Court, while observing that Nevada Revised Statute 51.385 "does not require the unavailability of a hearsay declarant as a prerequisite to the admissibility of the declarant's statements," nonetheless explicitly affirmed the trial court's determination

"that the child was unavailable as a witness." *Bockting*, 847 P.2d at 1366 n.4; *see also* NEV. REV. STAT. 51.385 (allowing the introduction of hearsay statements when "the child testifies at the proceeding" in addition to when the child "is unavailable or unable to testify"). I would therefore reject Bockting's argument that the state supreme court's unavailability determination is not entitled to deference because the trial court failed to ascertain whether Autumn was available to testify at trial.

A more difficult question is whether the Nevada Supreme Court's substantive unavailability determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In past decisions, the Supreme Court has not found it necessary to decide whether a child witness is "unavailable" for Confrontation Clause purposes when the child is merely emotionally or developmentally incapable of testifying in that forum. *See Idaho v. Wright*, 497 U.S. 805, 815-16, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). As a general matter, however, the Court held in *Roberts* that "a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a *good-faith effort* to obtain [her] presence at trial." *Roberts*, 448 U.S. at 75, *quoting Barber v. Page*, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968) (emphasis added).

Seizing on *Roberts*'s good faith requirement, Bockting makes a plausible argument that child witnesses who refuse to testify in a courtroom setting should not be considered "unavailable" unless the government first makes a good-faith attempt to secure their testimony through closed circuit television or some other medium amenable to cross-examination. I need not consider the merits of Bockting's

proposal, however, because my task here is not to decide what might be best; instead, my review is limited to whether the Nevada Supreme Court's application of *Roberts* was *unreasonable*. *See* 28 U.S.C. § 2254(d). On its face, *Roberts* requires no more than "a good-faith effort to obtain [a witness's] presence at trial," *Roberts*, 448 U.S. at 75 (emphasis removed), *quoting Barber*, 390 U.S. at 724-25, and the government arguably satisfied this requirement here by (1) securing Autumn's physical "presence" at trial and (2) making "a good-faith effort" to elicit her testimony in that forum.

The Supreme Court's more recent decisions dealing with alternative procedures for obtaining trial testimony do not materially advance Bockting's habeas petition. Although the Supreme Court has permitted states to substitute one-way closed circuit television for in-court child testimony under certain circumstances, *see Maryland v. Craig*, 497 U.S. 836, 855, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), it has never intimated that the Constitution *requires* the government to attempt such alternative procedures as a precondition for an unavailability finding. *Cf. Wright*, 497 U.S. at 818 ("Out-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances, and we do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial."). To the contrary, the Court has emphatically rejected the assertion that *Craig*, 497 U.S. at 855, and *Coy v. Iowa*, 487 U.S. 1012, 1021, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), require the government to demonstrate "necessity" before introducing pretrial hearsay statements. *See White v. Illinois*, 502 U.S. 346, 358, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992) ("There is . . . no basis for importing the 'necessity requirement' announced in [*Craig* and *Coy*] into the much different context of out-of-court declarations . . . ."). I would

hold, therefore, that the Nevada Supreme Court's failure to insist upon alternative procedures for procuring Autumn's contemporaneous testimony did not involve an unreasonable application of *Roberts*, *Craig*, or *Coy*.

Setting aside Bockting's assertions of legal error, I must decide whether the Nevada Supreme Court's unavailability finding "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) (holding that subsection 2254(d)(2) "applies . . . to situations where petitioner challenges the state court's findings based entirely on the state record"). Under this deferential standard of review, I may not "determine that the state-court factfinding process is defective in some way" unless I am "satisfied that any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate." *Taylor*, 366 F.3d at 1000.

The record does not support Bockting's claim that the Nevada Supreme Court's reliance on the trial court's unavailability finding "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Gill v. Ayers*, 342 F.3d 911, 917 n.5 (9th Cir. 2003) (explaining that when a state supreme court summarily adopts a lower court's finding of fact "we look through the unexplained . . . decision to the last reasoned decision . . . as the basis for the state court's judgment" (internal quotation marks, brackets, and citation omitted)). At Bockting's preliminary hearing, Autumn initially responded to the prosecution's inquiries with incomplete or evasive answers, then quickly broke into tears and refused to answer any further questions. Efforts to elicit her testimony at trial were

even less fruitful, as she refused so much as to stand or to raise her hand to be sworn in as a witness. The trial transcript does not paint a detailed portrait of Autumn's demeanor on the latter occasion, but there are strong hints that Autumn was distraught and uncommunicative from the start, leading the state trial court to conclude that there was no use pursuing further questioning before the jury. I therefore am not "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude" that Autumn was emotionally incapable of testifying at trial. *Taylor*, 366 F.3d at 1000. To the contrary, deference to state courts is particularly appropriate in a case such as this, where findings of fact turn on a trial court's eye-witness evaluation of a child witness's demeanor. *Cf. Wainwright v. Witt*, 469 U.S. 412, 428, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) ("Determinations of demeanor . . . . [are] entitled to deference even on direct review; 'the respect paid such findings in a habeas proceeding should be no less.'" (quoting *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984))). As Bockting did not present any evidence in federal district court to challenge the state trial court's findings, I presume that the trial court's findings are correct. *See* 28 U.S.C. § 2254(e)(1); *Taylor*, 366 F.3d at 1000 ("Once the state court's fact-finding satisfies this intrinsic review [on the record,] . . . the state court's findings are dressed in a presumption of correctness . . . .").

In sum, Bockting has not established that the Nevada Supreme Court's unavailability determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

2.

Turning to *Roberts*'s "adequate indicia of reliability" requirement, the Nevada Supreme Court acknowledged that Autumn's hearsay statements did not fit within any "firmly rooted hearsay exception" but held that her statements bore the requisite "particularized guarantees of trustworthiness" for admission under *Roberts*. *Bockting*, 847 P.2d at 1367-70. Applying the multifactor test outlined in *Wright*, 497 U.S. at 821-22, the court identified several circumstances which, in its view, buttressed the "trustworthiness" of Autumn's abuse allegations, including: (1) the "spontaneity and consistent repetition" of her statements, (2) the "agitation and fear" before first recounting the experience to her mother as evinced by "the fact that she was visibly shaken and crying," (3) her apparent "knowledge of sexual conduct not present in most children six years of age," (4) her "child-like terminology" which "was reflective of candor rather than coaching," and (5) her "display of affection for Bockting . . . indicative of love rather than hate." *Bockting*, 847 P.2d at 1369.

Bockting argues that the Nevada Supreme Court evaluated the trustworthiness of Autumn's statements based on an unreasonable application of Supreme Court precedent, because it mistakenly interpreted *Wright* to prohibit consideration of any evidence that did not support trustworthiness. *Wright* held that in evaluating whether a declarant's statement bears "'particularized guarantees of trustworthiness[,]' . . . relevant circumstances include only those that surround the *making* of the statement," not evidence corroborating the *substance* of a declarant's hearsay statements (e.g., physical evidence of sexual abuse). *Wright*, 497 U.S. at 819 (emphasis added). Although *Wright* did not decide whether courts may consider noncorroborating

evidence that refutes the substance of a declarant's statements (e.g., physical evidence contradicting an accuser's abuse allegations), *see Swan v. Peterson*, 6 F.3d 1373, 1381 (9th Cir. 1993) --an issue not before us here--the Court's reasoning strongly suggests that courts must at least consider any circumstances surrounding the making of an out-of-court statement that challenge the statement's trust-worthiness (e.g., inconsistencies, motives to fabricate). *See Wright*, 497 U.S. at 825-27; *Webb v. Lewis*, 44 F.3d 1387, 1392 (9th Cir. 1994) (holding that *Wright* "does not forbid recourse to other evidence that confirms the presumptive unreliability of the hearsay"); *Swan*, 6 F.3d at 1381 n.7 (reasoning in dicta that "because *Wright* holds that the consistency of a child witness's allegations bears on the reliability of an initial hearsay statement, arguably a later *inconsistent* statement should also be evaluated in making the reliability determination").

I need not decide, however, if a categorical refusal to consider evidence challenging the trustworthiness of Autumn's out-of-court statements would constitute an objectively unreasonable application of *Wright*, for the record does not support Bockting's assertion that the Nevada Supreme Court "explicitly refused to consider evidence" establishing the unreliability of Autumn's accusations in this case. Footnote 8 of the state supreme court's opinion characterizes *Wright* as excluding "corroborative evidence . . . in determining the reliability of hearsay statements" and hypothesizes that *Wright* might require courts "to exclude evidence of marital discord on the part of the parents as a possible motive in the mother for having the child fabricate charges of sexual abuse against the husband." *Bockting*, 847 P.2d at 1369 n.8. Although these statements suggest the court might have mis*interpreted Wright* to some degree, they do not clearly establish that the court mis*applied Wright* in this case

by refusing to consider critical, admissible evidence such as the marital discord between Bockting and Laura. In the body of its opinion, the court stated it reached its trustworthiness determination based on "*the totality of the circumstances* surrounding the child's out-of-court statements" and asserted that "neither the [five] factors [listed above] *nor any other aspect of the record evidence* provides insights into a motive for dissembling on the part of the child." *Id.* at 1369-70 (emphasis added). True, the court did not expressly discuss the Bocktings' marital discord and certain other evidence damaging to the trustworthiness of Autumn's statements, but it did refer to Laura's testimony that Autumn "had seen adult sexual organs in the past, had showered with both her mother and Bockting, and had seen her mother and stepfather having intercourse after entering the bedroom unnoticed by the adults." *Id.* at 1369 n.7. Given the Nevada Supreme Court's assertion that it considered all the "record evidence" in assessing Bockting's claims, it would appear that its "totality of the circumstances" analysis did, in fact, embrace the Bocktings' marital problems and other relevant circumstances surrounding Autumn's out-of-court statements. I would thus reject Bockting's contention that the Nevada Supreme Court unreasonably applied *Wright*'s restrictions on corroborating evidence.

The ultimate determination "whether [Autumn's] hearsay statements were sufficiently reliable to be admitted without violating [*Roberts*] is a mixed question" of law and fact, *Swan*, 6 F.3d at 1379, so I review the Nevada Supreme Court's reliability determination to ascertain whether it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also Davis v. Woodford*, 333 F.3d 982, 990 (9th Cir. 2003) (stating that subsection 2254(d)(1) applies "to mixed questions

of law and fact" (citing *Williams v. Taylor*, 529 U.S. 362, 407-09, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2001)). To the extent the Nevada Supreme Court's "particularized guarantees of trustworthiness" rest on findings of fact, I must decide whether the determination "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Bockting argues that neither the spontaneity and emotional intensity of Autumn's allegations nor her apparent lack of motive to fabricate are indicative of truthfulness, because they can easily be explained away by one of two alternative theories. First, he observes that Autumn delivered her original abuse account shortly after arising from sleep and contends that she could have been recounting a fantastical nightmare. This "nightmare" theory is entirely speculative and appears implausible given the graphic specificity of Autumn's allegations. Second, Bockting posits that Laura might have fabricated the abuse allegations herself and coached Autumn through the police interviews. Like the "nightmare" theory, this "coaching" theory is utterly unsubstantiated by the record, and it fails to account for Autumn's spontaneous use of dolls to describe the assault during her interview with Zinovitch and the child-like terminology Autumn used to describe her abuse. *See Bockting*, 847 P.2d at 1368. Because Bockting's speculation and conjecture do not establish that the Nevada Supreme Court's factual findings were "unreasonable" with respect to Autumn's spontaneity, mental state, and motive, 28 U.S.C. § 2254(d)(2), I presume these findings are correct, *id.* § 2254(e)(1). *See Taylor*, 366 F.3d at 1000.

Somewhat more compelling is Bockting's challenge to the Nevada Supreme Court's reliance on Autumn's "knowledge of sexual acts that a child of six would not usually be aware

of absent personal experience." *Bockting*, 847 P.2d at 1369. Laura conceded at trial that Autumn had seen adult sexual organs, had showered with each of her parents, had watched her mother practice exotic dancing, and had observed her parents engaging in sexual intercourse after entering the bedroom unnoticed. Bockting elaborated on Laura's testimony, alleging that Autumn had witnessed her parents engage in oral sex and was herself "interested" in sex. For these reasons alone, the state supreme court had reason to suspect that Autumn's familiarity with adult sexual acts would exceed that of the average six-year-old. On the other hand, the state supreme court concluded that the testimony of Autumn's parents did not adequately account for Autumn's ability to "demonstrate[] through the use of the dolls the positions that would have been necessary for the acts to take place between a large adult male and a small female child" and to describe "how she held onto the [bathroom] sink while Bockting was behind her and 'would press real hard and it hurt.'" *Id.* The substance of Autumn's allegations disclosed knowledge of sexual acts gained from direct personal experience, not remote observation. Thus, it was not unreasonable for the state supreme court to find, as it did, that Autumn's prior exposure to adult sexual acts did not adequately explain her familiarity with the specific acts described in her abuse allegations.

Arguably the weakest link in the Nevada Supreme Court's "particularized guarantees of trustworthiness" determination is its finding that "sufficient . . . consistent repetition existed in [Autumn's] various statements." *Id.* Autumn's abuse allegations to her mother and Detective Zinovitch were substantially identical, so it was not unreasonable for the state supreme court to conclude that Autumn's "restatement of her travails [to Detective Zinovitch] was consistent with the details she had previously told to her mother." *Id.* at 1368.

On the other hand, the court did not mention that Autumn's out-of-court statements contradicted her testimony at the preliminary hearing in several material respects. The Nevada Supreme Court's inattention to these inconsistencies in Autumn's statements is potentially significant under AEDPA; as the Supreme Court has observed and we have held, section 2254(d)(2) allows habeas relief "where the state has before it, yet apparently ignores, evidence that supports [a] petitioner's claim." *Taylor*, 366 F.3d at 1001 (paraphrasing *Miller-El v. Cockrell*, 537 U.S. 322, 346, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)).

Although the Nevada Supreme Court did not expressly discuss Autumn's statements at the preliminary hearing when evaluating the consistency of her out-of-court statements, it did not ignore these statements altogether. The court clearly recognized the inconsistencies in Autumn's statements, because the "Facts" section summarized Autumn's relevant testimony at the preliminary hearing. *See Bockting*, 847 P.2d at 1365 ("At the preliminary hearing, ... [Autumn] stated that her pants were never removed [during the alleged abuse] and that she could not remember how Bockting touched her."). Thus, this testimony was an "aspect of the record evidence" that the state supreme court incorporated into its evaluation of the "totality of the circumstances surrounding the child's out-of-court statements, as defined in *Wright*." *Id.* at 1369-70. As such, I would reject Bockting's assertion that the state supreme court "failed to consider and weigh relevant evidence that was properly presented." *Taylor*, 366 F.3d at 1001.

Moreover, Autumn's testimony at the preliminary hearing does not compel the conclusion that the Nevada Supreme Court's reliability analysis runs "contrary to, or involve[s] an unreasonable application of," *Roberts* or *Wright*. 28 U.S.C.

§ 2254(d)(1). As we recently explained, "the Supreme Court has specifically 'declined to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under [*Roberts*],'" and "'courts have considerable leeway in their consideration of appropriate factors.'" *Parle v. Runnels*, 387 F.3d 1030, 1039 (9th Cir. 2004), *quoting Wright*, 497 U.S. at 822. In this case, the state supreme court had good reason to focus on the consistency of Autumn's statements to her mother and Detective Zinovitch and discount the reliability of her in-court statements as factors in its reliability analysis. Autumn's testimony at the preliminary hearing was patently evasive, perhaps reflecting her emotional state, her desire to minimize harm to her stepfather, and her embarrassment at being asked to discuss the assault's graphic details in an open public forum. Doctor Donovan's expert testimony also indicated that Autumn's equivocation at the preliminary hearing was consistent with the denial phase child abuse victims commonly endure after a sexual assault. Considering the totality of the circumstances surrounding Autumn's hearsay statements, *see id.* at 820, I am not persuaded that the Nevada Supreme Court applied *Roberts* and *Wright* unreasonably by holding that Autumn's testimony at the preliminary hearing does not singlehandedly tip the scale of reliability against the admission of her out-of-court statements.

Since the Nevada Supreme Court's "unavailability" and "adequate indicia of reliability" determinations satisfy AEDPA's stringent standard of review, Bockting's Confrontation Clause claim fails.

II.

In addition to his Confrontation Clause claim, Bockting raises several other claims in support of his habeas petition.

Although neither Judge McKeown nor Judge Noonan discuss these issues, I explain why these arguments should not require reversal.

A.

Bockting contends that the state trial court violated his right to due process by admitting witness testimony regarding a prior accusation of sexual misconduct. Bockting takes issue with the following exchange between Deputy District Attorney Lukens and Laura, which took place during the state's rebuttal to defense character evidence:

> Q: Without going into the details underlying this, I am going to ask you the following question. Between July of 1987 and October of 1987, did you have occasion to confront the defendant with allegations of sexual contact between him and Autumn?
>
> A: Yes.
>
> Q: What was his response at the time?
>
> A: He denied it, said he wouldn't do anything like that, he was crying so at that time I didn't believe what she said.

Bockting did not object to these questions or request a limiting instruction, and the state trial court did not give such an instruction.

During his "post conviction relief" hearing, Bockting argued that Laura's testimony impermissibly allowed the jury to consider past allegations of sexual assault as evidence that he committed the subsequent sexual assault for which he was

convicted. The state trial court and supreme court upheld the evidence's admission, holding that the trial court's decision was consistent with state evidence law. *See* NEV. REV. STAT. 48.045(1) ("Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except . . . [as] offered by an accused, and similar evidence offered by the prosecution to rebut such evidence . . . ."); *id.* 48.055. ("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or in the form of opinion. On cross-examination, inquiry may be made into specific instances of conduct.").

I do not consider at this stage whether the Nevada Supreme Court misinterpreted Nevada law by refusing to grant post-conviction relief based on the trial court's decision to admit Laura's testimony without providing a limiting instruction sua sponte. "Incorrect state court evidentiary rulings cannot serve as a basis for habeas relief unless federal constitutional rights are affected." *Whelchel v. Washington*, 232 F.3d 1197, 1211 (9th Cir. 2000) (internal quotation marks and citation omitted). Thus, my task is limited to deciding whether the evidence's admission violated Bockting's clearly established *federal* rights as defined by the Supreme Court. *See* 28 U.S.C. § 2254(d)(1).

The Supreme Court has never decided whether due process prohibits the admission of prior bad acts evidence, *see Estelle v. McGuire*, 502 U.S. 62, 75 n.5, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (declining to decide whether due process prohibits prior bad acts evidence to show propensity to commit a crime); *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003), *cert. denied*, 540 U.S. 930, 124 S. Ct. 345, 157 L. Ed. 2d 236 (2003) (mem.) ("There is no clearly

established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence."), but it has said that defendants who challenge a state court's admission of relevant evidence on due process grounds "must sustain the usual heavy burden that a due process claim entails: . . . 'it [must] offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Montana v. Egelhoff*, 518 U.S. 37, 43, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) (plurality), *quoting Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal footnote omitted).

In this case, the admission of Laura's unobjected-to testimony did not meet this "heavy burden" for a valid due process claim. The trial court admitted Laura's testimony during the state's rebuttal case as a response to the testimony of three defense witnesses who testified concerning Bockting's alleged good reputation and character. Laura's rebuttal testimony was relevant to impeach the defense's reputation evidence. The prosecutor touched on Laura's previous allegations only briefly, deliberately skirted the allegations' underlying details to minimize prejudice, and fully disclosed Bockting's vehement denial of the allegations. Moreover, the testimony arguably advanced Bockting's defense by introducing his emotional denial of the previous allegations, as well as Laura's concession that she "didn't believe" the allegations. Given that this evidence came in response to defense character evidence and taking into account the lack of objection, the brevity, and limited scope of the government's questioning relating to Laura's previous confrontation with Bockting, it was not unreasonable for the Nevada Supreme Court to conclude that the admission of this evidence did not transgress a "principle of justice so rooted in the traditions

and conscience of our people as to be ranked as fundamental." *Id.* (internal quotation marks omitted).

B.

Bockting asserts that the government violated his due process right to a fair trial by vouching for Laura's credibility during closing argument. *See United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993) ("Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony."). As examples of vouching, Bockting cites the prosecutor's statements that Laura "testified as candidly as I think is possible" and "had one motive and it was to tell you the truth." He also faults the prosecutor for characterizing Laura's testimony as "unembellished, . . . straightforward, and . . . candid."

Even if these statements arguably constituted "vouching," Bockting does not qualify for habeas relief under AEDPA's deferential standard if the Nevada Supreme Court's failure to grant post-conviction relief on this basis was neither "contrary to," nor "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). According to the Supreme Court, "the relevant question" in evaluating a prosecutorial vouching claim "is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).

Several factors work to Bockting's disadvantage here. First, the prosecutor did not ask the jury to accept Laura's

credibility based on his endorsement alone; rather, he explained that "the *evidence* shows that [Laura] was candid" (emphasis added), and he identified several specific instances where Laura made no attempt to conceal facts damaging to Autumn's allegations (e.g., Autumn observing her parents engaged in sexual relations) or to her own reputation and credibility as a government witness (e.g., her drug and alcohol problems, her occupation as a nude dancer). *See Necoechea*, 986 F.2d at 1276 (recognizing "that prosecutors must have reasonable latitude to fashion closing arguments, and thus can argue reasonable inferences based on the evidence, including that one of the two sides is lying"). Second, the trial court significantly diminished the risk of prejudice by instructing the jury that "statements, arguments and opinions of counsel are not evidence in the case." As in *Davis v. Woodford*, 333 F.3d 982 (9th Cir. 2003), "this was not a case in which there was an 'overwhelming probability that the jury [would] be unable to follow the court's instructions' and 'a strong likelihood that the effect of the [vouching] would be devastating to the defendant,'" *id.* at 997 (second alteration in original), *quoting Greer v. Miller*, 483 U.S. 756, 766 n.8, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987). Third and perhaps most important, the prosecutor's statements did not render the trial fundamentally unfair because the record confirmed Laura's testimony, including: testimony by Doctor Rivers (who conducted Autumn's rape examination) that Autumn had suffered penetration injuries to her vagina and rectum during the previous week, Bockting's admission that he was the only adult male who was alone with Autumn during the week when she sustained her injuries, and Detective Zinovitch's testimony substantially corroborating Laura's description of Bockting's sexual assault. In sum, under the circumstances of this case, Bockting has not demonstrated that the Nevada Supreme Court applied the principle in *Darden* unreasonably by holding that the

prosecutor's vouching did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Davis*, 333 F.3d at 996-97, *quoting Darden*, 477 U.S. at 181.

C.

Lastly, I consider Bockting's assertion that his representation at trial was constitutionally deficient. The Supreme Court has held that a claimant "must show that counsel's performance was deficient" and that such "performance prejudiced the defense" to prevail on a Sixth Amendment ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice, a claimant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The question to be answered is whether the Nevada Supreme Court's denial of post-conviction relief was "contrary to, or involved an unreasonable application of," these principles. 28 U.S.C. § 2254(d)(1).

I confine my ineffective assistance analysis to the three issues addressed in our October 16, 2002 order granting Bockting's first motion to broaden the Certificate of Appealability (COA): (1) trial counsel's failure to object to inadmissible hearsay evidence at trial, (2) trial counsel's failure to object to repeated instances of prosecutorial vouching, and (3) appellate counsel's failure to research adequately and present these appealable issues to the Nevada Supreme Court. Bockting's second motion to broaden the COA, which is currently before this court, raises a fourth

ineffective assistance of counsel issue: his "trial counsel's failure to conduct any investigation of the facts which would undermine the reliability of the child's hearsay statements." The second motion for broader certification was filed on June 17, 2003--more than a year after the district court declined to certify Bockting's ineffective assistance of counsel claim and eight months after we granted his first motion to broaden the COA. Pursuant to Circuit Rule 22-1(d), Bockting should have raised any and all grievances relating to the COA's scope "within thirty-five days of the district court's entry of its order denying[, in part, his] certificate of appealability." 9TH CIR. R. 22-1(d). His "failure to comply with the Circuit Rule's procedure is a ground for denying" the second motion, "which [I would] do here." *Griffin v. Johnson*, 350 F.3d 956, 960 (9th Cir. 2003).

With respect to the remaining Sixth Amendment claims, the Nevada Supreme Court invoked *Strickland*'s standard and held that Bockting "has not demonstrated that counsel's performance was unreasonable, or that counsel's errors were so severe that they rendered the jury's verdict unreliable." I need not consider the first part of this holding, because the record as a whole does not support Bockting's claim that the state supreme court unreasonably applied *Strickland*'s prejudice inquiry. *Cf. Kennedy v. Lockyer*, 379 F.3d 1041, 1053 (9th Cir. 2004) (observing that "in making a harmless error determination in a habeas case," federal courts have "an obligation" to consult the full record), *quoting O'Neal v. McAninch*, 513 U.S. 432, 435, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995).

Bockting faults his trial counsel for failing to object to the government's prior bad acts evidence, but he has not demonstrated that he suffered any prejudice from his counsel's allegedly deficient performance. A timely objection

by Bockting's counsel likely would have been futile, because Laura's testimony was admissible under state law. In addition, even setting aside Laura's testimony concerning Bockting's prior bad acts evidence, the evidence against Bockting was overwhelming. Similar logic dooms Bockting's other arguments. His trial counsel's failure to register a timely objection to the prosecutorial vouching did not clearly prejudice his defense, because the trial court gave a cautionary instruction and there was overwhelming evidence corroborating Laura's testimony.

In sum, Bockting has not shown that the Nevada Supreme Court applied *Strickland* unreasonably to the facts of this case by holding that his "counsel's errors were [not] so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. I would therefore hold that we lack authority under AEDPA to grant Bockting's petition for habeas relief on this ineffective assistance of counsel claim.

For the foregoing reasons, I would affirm the district court's denial of Bockting's petition for habeas corpus. I therefore respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 02-15866
D.C. No. CV-N-98-0764-ECR
(Nevada, Reno)

[Filed March 2, 2005]

MARVIN HOWARD BOCKTING,	)
Petitioner-Appellant,	)
	)
v.	)
	)
ROBERT BAYER, et al.	)
Respondents-Appellees.	)
	)

Appeal from
The United States District Court
For the District of Nevada

APPELLEE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

[Table of Contents and Table of Authorities
Omitted in this Appendix]

I. ISSUES PRESENTED

1. THE CONFLICTING OPINIONS OF THE PANEL MEMBERS DID NOT RESULT IN A PRECEDENTIAL DECISION BECAUSE THE PANEL ENTERED THREE CONFLICTING OPINIONS AND FAILED TO COME TO ANY CONSENSUS OF AT LEAST TWO JUDGES ON THE CORE QUESTION OF *TEAGUE*, AND THE DECISION ERRS IN CHARACTERIZING ITSELF AS A 2-TO-1 DECISION GRANTING THE WRIT UPON *CRAWFORD V. WASHINGTON*, 541 U.S. 36, 124 S.CT. 1354,158 L.ED. 2d 177 (2004).

2. ASSUMING ARGUENDO THAT THE OPINION CONSTITUTES A TWO-JUDGE MAJORITY HOLDING THAT *CRAWFORD* IS A NEW RULE THAT APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW, THE PANEL'S DECISION INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE IN THAT THE DECISION CREATED A DIRECT CONFLICT WITH THE PUBLISHED DECISIONS IN THE SECOND, EIGHTH, AND TENTH CIRCUITS.

3. ASSUMING ARGUENDO THAT THE OPINION CONSTITUTES A TWO-JUDGE MAJORITY HOLDING THAT CRAWFORD IS A NEW RULE THAT APPLIED RETROACTIVELY TO CASES ON COLLATERAL REVIEW, THE PANEL'S DECISION CONFLICTS WITH A DECISION OF THIS COURT, TO WIT: *HIRACHETA V. ATTORNEY GENERAL*, NO. 03-16295 (2004), CONSIDERATION BY THE FULL

COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS.

4. ASSUMING ARGUENDO THAT THE OPINION CONSTITUTES A TWO-JUDGE MAJORITY HOLDING THAT *CRAWFORD* IS A NEW RULE THAT APPLIES RETROACTIVELY, IT CONFLICTS WITH A NUMBER OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, INCLUDING *TEAGUE V. LANE*, 489 U.S. 288, 109 S.CT. 1060, 103 L.ED. 2D 334 (1989), AND ITS PROGENY, AND 28 U.S.C. § 2254(D)(1), AND CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS ACCORDING TO SUPREME COURT PRECEDENT.

5. THE PANEL'S DECISION CONFLICTS WITH A DECISION OF THE SUPREME COURT OF THE UNITED STATES, TO WIT: *BRECHT V. ABRAHAMSON*, 507 U.S. 619, 113 S.CT. 1710, 123 L.ED. 2D 353 (1993), IN THAT THE PANEL FAILED TO APPLY THE CORRECT STANDARD FOR HARMLESS ERROR, AND CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS ACCORDING TO SUPREME COURT PRECEDENT.

II. BACKGROUND

This matter is an appeal of a decision of the district court denying a habeas corpus petition by a State inmate under 28 U.S.C. § 2254. On February 22, 2005, the panel entered a

published decision finding that the matter of certain hearsay testimony introduced at trial in 1988 was governed by the new Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). The panel applied the *Crawford* decision *retroactively* to Bockting's case long after the conviction had become final and when it was on collateral review, under the second exception to the non-retroactivity rule set forth in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989).

The decision is characterized by the panel members as a 2-to-1 decision in favor of granting the writ. This characterization is erroneous, because of the specific nature of the opinions. The decision is complicated by its fragmented nature, as it actually contains three conflicting opinions, none of which agree on the totality of the necessary elements of the disposition itself, and by the fact that the judges disagree about the nature of the "majority" opinion, and its precedential value. The decision is, in effect, a 1-1-1 split of the three judges. One judge, Judge McKeown, opined that the rule of *Crawford* was a new procedural rule and that it was applicable retroactively to cases on collateral review; another judge, Judge Wallace, opined that the *Crawford* rule was a new procedural rule which was <u>not</u> applicable retroactively to cases on collateral review; the remaining judge, Judge Noonan, held that the rule in *Crawford* was not a new rule, but only a "correction of a misrepresentation", and that retroactivity was not a relevant issue.

III. ARGUMENT

A. THE CONFLICTING OPINIONS OF THE PANEL MEMBERS DID NOT RESULT IN A PRECEDENTIAL DECISION BECAUSE THE PANEL ENTERED THREE CONFLICTING OPINIONS AND FAILED TO COME TO ANY CONSENSUS OF AT LEAST TWO JUDGES ON THE CORE QUESTION OF *TEAGUE*, AND THE DECISION ERRS IN CHARACTERIZING ITSELF AS A 2-TO-1 DECISION GRANTING THE WRIT UPON *CRAWFORD*.

The primary opinion by Judge McKeown states on page 2001 that she and Judge Noonan both found ways to apply *Crawford* to Bockting's case, she by finding it a new rule that was retroactive, and he by finding it a rule that was not new. Her opinion thereby states that two judges held for Bockting in a 2-1 decision. This conclusion is erroneous. Despite the appellation of his opinion as a "concurring" opinion, Judge Noonan in fact *dissented* from Judge McKeown's opinion. His opinion contains two parts, his dissenting opinion that is three pages long, and a second opinion, just one sentence long, wholly inconsistent with the first, and in effect, recanting that first opinion. Judge Noonan's opinion wholly disagrees with that of Judge McKeown as to *both* rationale *and* result, and cannot, therefore, constitute a concurring opinion. Because Judge Noonan explicitly rejected Judge McKeown's rationale *and* result, his opinion is, in actuality, a *dissenting* opinion. Thereafter, his second opinion wholly repudiates his first opinion in irreconcilable terms. He attempts to do two conflicting things simultaneously–he wholly rejects, and yet wholly accepts, Judge McKeown's argument. It is not possible to discern what Judge Noonan's position is, as his two opinions negate each other on the same

issue, and this internally inconsistent position is a logical impossibility, creating an irreconcilable conflict. Moreover, it appears that Judge McKeown's opinion rejects Judge Noonan's attempt to negate his own opinion and to join hers, when she states just the *opposite,* that Judge Noonan gets to *Crawford* a *different* way from hers, by *rejecting* the applicability of *Teague*. *Bockting*, at 2001. According to the opinions themselves, then, there is no consensus as to how the "majority" opinion was formed. According to the opinions, there is none.

Black's Law Dictionary defines "to concur" and "concurring opinion" as an opinion filed by an appellate judge or justice in which (s)he agrees with the ultimate conclusion or result of another opinion filed in the case, while disagreeing with, and offering a separate rationale for reaching, that decision. Such separate opinions, of course, are common. Here, Judge Noonan did not file a concurring opinion, but rather two internally inconsistent opinions—one longer *dissenting* opinion, and a subsequent one-sentence opinion purportedly *joining* Judge McKeown's opinion, which was never recognized by her.

This inconsistency creates two foundational problems. First, opinions which are internally inconsistent are routinely criticized and rejected by courts, and further serve as grounds for reconsideration and reversal. See, *Darien Capital Management, Inc. v. Commonwealth of Pennsylvania*, 549 Pa. 1, 8, fn. 7, 700 A.2d 395 (1997) (reversal of trial court for inconsistencies in ruling); *State of Wisconsin v. Sullivan*, 184 Wis. 2d 668, 680, fn. 11, 517 N.W. 2d 449 (1994) (reversing court of appeals for inconsistencies in published opinion); *Green v. French*, 143 F.3d 865 (4th Cir. 1998) (appellate court criticizing sister appellate court for confusion and internal inconsistency in published opinion). Members of

this court, too, have filed vociferous dissenting opinions criticizing the internal inconsistency of majority opinions. See, *United States v. Koon*, 45 F.3d 1303 (9th Cir. 1995). Here, of course, the inconsistency of Judge Noonan's "concurring opinion" is clear and fundamental–he both disagrees with, and agrees with, simultaneously, the primary opinion. He apparently concludes that Judge McKeown is both completely wrong and completely right, and he purports to posit, simultaneously, that the *Crawford* decision is both not "new" under *Teague* and, at the same time, wholly new. This position is impossibly inconsistent.

Second, Judge McKeown errs in a similar fashion by concluding that her opinion and Judge Noonan's longer opinion together constitute a majority opinion holding that *Crawford* applies to Bockting's case (even if under different theories). Her statement on page 2001 that she and Judge Noonan both found ways, albeit different ones, to apply *Crawford*, and to form a majority opinion for Bockting, is itself not correct. The necessary threshold issue under *Teague* is whether the *Crawford* rule is a new rule. Judge McKeown and Judge Wallace both held that the Crawford rule was a "new rule" under *Teague*. That is the majority ruling on that threshold issue. Judge Noonan's opinion regarding *Crawford*'s non-newness is merely a dissenting opinion standing in opposition to the two judge majority that ruled that *Crawford* was a new rule. Judge Noonan was overruled on this issue, so he cannot reach it, with or without another judge's opinion. Even Judge Noonan recognizes this fact– this was the precise basis for his second opinion which renounced and disavowed his first. Again, there is no consensus as to how the "majority" opinion was formed, and the statements within the opinions on this subject are not supported by the opinions themselves.

B. ASSUMING ARGUENDO THAT THE OPINION CONSTITUTES A TWO-JUDGE MAJORITY HOLDING THAT *CRAWFORD* IS A NEW RULE THAT APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW, THE PANEL'S DECISION INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE IN THAT THE DECISION CREATED A DIRECT CONFLICT WITH THE PUBLISHED DECISIONS IN THE SECOND, EIGHTH, AND TENTH CIRCUITS.

If there is a majority opinion holding that *Crawford* is a new rule retroactively applicable to cases on collateral review, it creates, for the first time, a conflict among the circuits. The Second, Eighth, and Tenth Circuits have issued published opinions holding that *Crawford* cannot be retroactively applied. *Mungo v. Duncan*, 393 F.3d 327, 335-36 (2d Cir. 2004); *Evans v, Luebbers*, 371 F.3d 438, 444-45 (8th Cir. 2004); *Brown v. Uphoff*, 381 F.3d 1219, 1225-27 (10th Cir. 2004). All of these decisions were *unanimous* dispositions against the retroactive application of *Crawford*.

C. ASSUMING ARGUENDO THAT THE OPINION CONSTITUTES A TWO-JUDGE MAJORITY HOLDING THAT *CRAWFORD* IS A NEW RULE THAT APPLIED RETROACTIVELY TO CASES ON COLLATERAL REVIEW, THE PANEL'S DECISION CONFLICTS WITH A DECISION OF THIS COURT, TO WIT: *HIRACHETA V. ATTORNEY GENERAL*, NO. 03-16295 (2004), AND CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS.

The panel's decision entered February 22, 2005 conflicts with a decision of this court, to wit: *Hiracheta v. Attorney General*, No. 03-16295 (2004), (see, Circuit Rule 36-3 (b)(iii)), and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. This court has held that rehearing is proper to resolve conflict among decisions in the Circuit's own case decisions:

> In his suggestion for rehearing en banc, Hardesty asserted that under the law of this circuit, the irreconcilable conflict between *Thornton* [*United States v. Thornton*, 710 F.2d 513 (9th Cir. 1983)] and *Terrovona* [*United States v. Terrovona*, 785 F.2d 767 (9th Cir. 1986)] must be resolved by an en banc court. In *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (en banc), cert. denied, 485 U.S. 989, 108 S.Ct. 1293, 99 L.Ed. 2d 503 (1988), we held that 'the appropriate mechanism for resolving an irreconcilable conflict is an en banc decision.' Id. at 1478-79. Unless an alternative method is provided by rule of this court, '[a] panel faced with such a conflict *must* call for en banc review, which the court will

> normally grant unless the prior decisions can be distinguished.'

United States v. Hardesty, 977 F.2d 1347 (9th Cir. 1992). *See, also*, Circuit Rule 36-3 (b)(iii). Because the court has already ruled that *Crawford* can have only prospective application, an irreconcilable conflict exists between that decision and this matter. The *Hiracheta* decision was unanimous against retroactivity, and cited *Luebbers*, supra, for its support.

D. ASSUMING ARGUENDO THAT THE OPINION CONSTITUTES A TWO-JUDGE MAJORITY HOLDING THAT *CRAWFORD* IS A NEW RULE THAT APPLIES RETROACTIVELY, IT CONFLICTS WITH A NUMBER OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, INCLUDING *TEAGUE V. LANE*, 489 U.S. 288, 109 S.CT. 1060, 103 L.ED. 2D 334 (1989), AND ITS PROGENY, AND 28 U.S.C. § 2254(D)(1), AND CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS ACCORDING TO SUPREME COURT PRECEDENT.

Crawford constitutes a new procedural rule under *Teague* that is not applicable retroactively, since it does not constitute a "watershed rule" under the second *Teague* exception.

In 1993, after remand from the United States Supreme Court, the Nevada Supreme Court applied the correct law to Bockting's appeal in an objectively reasonable manner under *Idaho v. Wright*, 497 U.S. 805 (1990), as the Court was specifically instructed to do. *Crawford* represents a new and

different rule with different elements from the law existing in 1993. The change was not foreseeable.

The Supreme Court held in *Teague* that a "new rule" was one which "breaks new ground or imposes a new obligation on the states or the federal government." *Teague*, 489 U.S. at 301. "A case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* When a decision of the United States Supreme Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. *Schriro v. Summerlin*, __ U.S. __, 124 S.Ct. 2519, 2522 (2004), citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708 (1987). " As to convictions that are already final, however, the rule applies only in limited circumstances." *Id.*, at 2522. New substantive rules generally apply retroactively, while new rules of procedure generally do not apply retroactively. Clearly, *Crawford* does not place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe", *Teague*, 489 U.S. at 307, and at 311, and does not create a new "'substantive categorical guarantee[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Saffle*, supra, 494 U.S. at 494, quoting *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989). *Crawford* is procedural.

New rules of procedure generally do not apply retroactively. New procedural rules do not produce a class of persons convicted of conduct the law does not make criminal, but merely "raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro*, supra, 124 S.Ct. at 2523. Because of the more "speculative connection to innocence," *Id.*, the Supreme Court gives retroactive effect to only a small set of

"'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.*, quoting *Saffle*, supra, at 495, quoting in turn, *Teague*, supra, 489 U.S. at 311. This category of new rules is exceedingly small.

It is not quite accurate to say, however, that new rules of procedure generally do not apply retroactively. In fact, it is quite a bit more accurate to say that new rules of procedure *almost never* apply retroactively:

> That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conv ction is seriously diminished'...This class of rules is extremely narrow, and '***it is unlikely that any...has yet to emerge.***' *Tyler v. Cain,* 533 U.S. 656, 667, n.7, 121 S.Ct. 2478, 150 L.Ed. 2d 632 (2001) (quoting *Sawyer v. Smith,* 497 U.S. 227, 243, 110 S.Ct. 2822, 111 L.Ed. 2d 193 (1990).

Schriro, 124 S.Ct. at 2523 (emphasis added).

It is instructive to the issue at hand that this statement by the Supreme Court was included in the *Schriro* decision, handed down only three and a half months *after the Crawford* decision issued. In it, the Supreme Court announced that it was a virtual conclusion that no new procedural rules of the magnitude sufficient to qualify as exceptions to the non-retroactivity rule had yet been created–even *after* issuance of the *Crawford* decision. The panel's decision did not appear to recognize the importance of the Supreme Court's conclusion. The set of non-qualifying new rules clearly included the *Crawford* rule.

In spite of the recognition that the second *Teague* exception is "extremely narrow", *Bockting*, at 2002, Judge McKeown still applied *Crawford* retroactively; her error in doing so the second *Teague* exception is McKeown still applied is three fold-first she artificially created a forced-choice dichotomy between watershed rules that can be retroactively applied, and what she calls new rules that "mere[ly] tweak" existing rules; *Bockting*, at 2009. She further states that *Schriro* offers "no guidance" to the question of retroactivity. *Id.* at 2022. The Appellees respectfully disagree.

This artificial distinction fails to reflect the fact that a new rule can be important, often *very* important, and still not be a watershed rule. Many very important new rules have been held to be non-retroactive; only *one* new rule, the right to counsel in *Gideon v. Wainwright*, 372 U.S. 335 (1963), has been held to be retroactive. The judge's standard, implying that any important rule should be retroactive to cases on collateral review, simply disregards the Supreme Court's directives. Her second error lies in her apparent confusion between a new rule that is based on an important right, and that *right itself*. New rules, and the underlying rights upon which they are based, are not coextensive. As the Tenth Circuit said in *Uphoff* in rejecting retroactivity for *Crawford*;

> It is true that in *Crawford* the Court referred to the protections of the Confrontation Clause as a 'bedrock procedural guarantee,' *Crawford*, 541 U.S. at ___, 124 S.Ct. at 1359, but that comment does not necessarily suggest that the rule set forth in Crawford is 'on the magnitude of the rule announced in *Gideon v. Wainwright*' as it must be to fit within the *Teague* exception...Unlike *Gideon*, *Crawford* does not 'alter [] our understanding of what constitutes basic due

> process,' but merely sets out new standards for the admission of certain kinds of hearsay.

Uphoff, supra at 1226.

The *Crawford* decision certainly did not create the right of cross examination, and it is not even remotely analogous to the rule in *Gideon v. Wainwright*, which did create a new right–the right to counsel in State court prosecutions. The right to confront was, furthermore, understood in the former rule of *Ohio v. Roberts*, 448 U.S. 56 (1980), and served as the basis of that rule. It was the right to confront upon which *Roberts* was based; *Crawford* merely *reflects* that right and creates a new mechanism for its application. Confusing this distinction between a new rule and its already-existing foundational right dilutes the extreme narrowness of the class of new rules that fall into the second *Teague* exception. Moreover, the notion that the *Schriro* decision "alters our understandings of bedrock procedural principles", *Bockting*, at 2003, finds no support in that decision, in light of the statement in that decision, cited supra, that "This class of rules is extremely narrow, and 'it is unlikely that any...has yet to emerge", made *after* the disposition of *Crawford*, and presumably inclusive of it.

Third, the primary opinion misreads the Supreme Court's second factor in its standard for bedrock rules–it is not that a bedrock rule is one which "seriously decreases the possibility of inaccurate conviction". According to the Supreme Court, "That a new procedural rule is 'fundamental' in some abstract sense is not enough;" the question is whether the former rule affects accuracy in such a manner to so seriously diminish accuracy that there is an impermissibly large risk of punishing conduct the law does not reach. *Schriro*, supra, 124 S.Ct. at 2525, citing *Teague*, at 312-313, quoting *Desist v. United*

States, 394 U.S. 244, 262, 89 S.Ct. 1030, 22 L.Ed. 2d 248 (1969). This standard is considerably higher than that applied by the primary opinion.

The new rule in *Crawford* is not on par with the rule announced in *Gideon v. Wainwright*. The new Crawford rule is more analogous to rules not found to be retroactive, such as the rule announced in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), requiring jury determination of sentences in capital cases, held in *Schriro* not to be retroactive, the rule announced in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), establishing a mechanism to protect against racially-motivated peremptory challenges, held in *Teague* not to be retroactive, and the rule in *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968), the fundamental right to trial by jury extended to the States, held in *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed. 2d 1308 (1968) not to be retroactive.[1] To paraphrase Judge McKeown from page 2009 of *Bockting*, there is nothing "mere" about any of these new rules either, and they are much more than mere tweaks of earlier rules, yet *none* of them was given retroactive application by the Supreme Court. The primary opinion simply applies an artificially low standard.

Finally, the primary opinion falls into the same quicksand that the Supreme Court warned of in *Schriro*–the uncritical assumption that the new rule will provide substantially more accuracy than the former. In *Schriro*, the Supreme Court

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[1] It is further noteworthy that the foundational decision in *Mapp v. Ohio*, 367 U.S. 643 (1961) concerning the exclusionary rule was held not to be retroactive in *Linkletter v. Walker*, 381 U.S. 618 (1965).

rejected this argument by pointing out that "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Schriro*, at 2525. While Judge McKeown assumes that it is unequivocal that the *Crawford* rule increases accuracy so far as to qualify for retroactive application, her assumptions of unequivocation are too presumptive. In *Mungo v. Duncan*, supra, the Second Circuit held that one reason the *Crawford* decision was not retroactive was because it is *not* assured that the new rule will increase accuracy. In words that echo the Supreme Court's similar warning in Schriro, the Second Circuit said:

> We do not believe that *Crawford* necessarily improves the overall accuracy of the criminal process. As we see the operation of the Crawford rule, it is likely to improve accuracy in some circumstances and diminish it in others. To the extent that *Crawford* requires the exclusion of unreliable hearsay that would have been admitted under the prior law, it is likely to improve accuracy... At the same time, however, *Crawford* also precludes admission of highly reliable testimonial out-of-court statements that would have been admissible under the old rules. In such instances, juries will be deprived of highly reliable evidence of guilt, and cases that otherwise would have resulted in well-deserved convictions will now result in acquittals or hung juries...it does not necessarily follow that the *Crawford* rule will improve the accuracy of the process.

Mungo, supra, at 335-36. Under *Crawford*, much hearsay is still admissible; much of that admissible hearsay will not necessarily be accurate or reliable.

Crawford did not announce a watershed rule.

E. THE PANEL'S DECISION CONFLICTS WITH A DECISION OF THE SUPREME COURT OF THE UNITED STATES, TO WIT: *BRECHT V. ABRAHAMSON*, 507 U.S. 619, 113 S.CT. 1710, 123 L.ED. 2D 353 (1993), IN THAT THE PANEL FAILED TO APPLY THE CORRECT STANDARD FOR HARMLESS ERROR, AND CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS ACCORDING TO SUPREME COURT PRECEDENT.

The primary opinion conducted a harmless error review of the police officer's hearsay-based testimony. The opinion, citing *Neder v. United States*, 527 U.S. 1 (1999) applied the *Chapman* beyond-a-reasonable-doubt harmless error standard, which is cited at length therein. The primary opinion at 2012 states it is applying that standard. The court applied the wrong harmless error standard.

In *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993), the Supreme Court decided that, upon habeas corpus review, the more deferential *Kotteakos* standard applied, rather than the *Chapman* standard. This court's conclusion demonstrates the application of the erroneous standard: "Even if her [the child rape victim's] statement to the mother was, for argument's sake, considered admissible, the detective's description of Autumn's interview was so significant that the error could have materially affected the verdict...." At 2012. The correct standard under *Brecht* requires a reviewing court to ask whether the error had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, supra, at 631. Here, the application, of the correct standard makes a significant difference because the court failed to analyze the importance

of the testimony of the child's mother regarding the child's sudden report of the sexual assaults and rapes by Bockting, hearsay testimony which is non-testimonial under *Crawford*, ***and which testimony was fully supported and corroborated by the scientific evidence of the medical examination performed on the child***. Under a complete analysis performed under the correct standard, the court would have necessarily come to the conclusion that the error, even assuming arguendo that *Crawford* could be applied retroactively under *Teague* and 28 U.S.C. § 2254 (d)(l), was harmless because other significant and admissible evidence was presented sufficient to convict Bockting.

IV. CONCLUSION

The Nevada Supreme Court correctly applied Supreme Court law in 1993, under 28 U.S.C. § 2254(d). For the reasons set forth above, the decision in Bockting's case should be withdrawn and the decision of the district court should be affirmed.

DATED this 2d day of March, 2005.

BRIAN SANDOVAL
Attorney General

By: /s/
VICTOR-HUGO SCHULZE, II
Deputy Attorney General
Special Prosecutions/Habeas
Corpus Unit-South

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 02-15866
D.C. No. CV-N-98-0764-ECR
(Nevada, Reno)

[Filed April 13, 2005]

MARVIN HOWARD BOCKTING,	)
Petitioner-Appellant,	)
	)
v.	)
	)
ROBERT BAYER,	)
Respondent-Appellee.	)
	)

Appeal from
The United States District Court
For the District of Nevada

APPELLANT'S OPPOSITION TO APPELLEE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

[Table of Contents and Table of Authorities
Omitted in this Appendix]

I.

WHEN A JUDGE OF THIS CIRCUIT OFFERS AN ALTERNATIVE RATIONALE FOR A RESULT AND SPECIFICALLY CONCURS WITH BOTH THE RATIONALE AND THE RESULT REACHED BY A SECOND MEMBER OF THE PANEL, A 2-1 DECISION RESULTS

Two members of the panel in this case determined that the decision in *Crawford, v. Washington*, 541 U.S. 36 (2004) should be applied retroactively to cases on collateral review. Judge McKeown held that the rule set forth in *Crawford* is new but that it should be applied retroactively because it was both a "watershed rule" and one without which the likelihood of an accurate conviction was seriously diminished. Judge Noonan offered an analysis that the rule in *Crawford* was a "bedrock procedural guarantee" that was not a new rule and that therefore the rule would apply to Bockting's case. However, Judge Noonan characterized his position as follows: "As an alternative to the foregoing analysis and in order to provide a precedent for this court, I also concur in Judge McKeown's **analysis and opinion**." [emphasis added]. Opinion at page 1024.

Respondent argues that "Judge Noonan's opinion wholly disagrees with that of Judge McKeown as to *both* rationale *and* result, and cannot, therefore, constitute a concurring opinion." Petition for Rehearing at p. 4. The State argues that Judge Noonan actually dissents from Judge McKeown's opinion and that therefore, there is no concurrence and no majority opinion.

While Judge Noonan offered an alternative reason why the result set forth in Judge McKeown's opinion is the right one, there is no question that Judge Noonan concurred with both the rationale and the result set forth in Judge McKeown's opinion.

The rule articulated by the U.S. Supreme Court in assessing the precedential value of plurality opinions is, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds..." *Gregg v. Georgia*, 428 U.S. 153, 169, n. 15 (1976). This rule need not be reached in this instance, however, because Judge Noonan expressly concurred in Judge McKeown's "analysis and opinion."

II.

REHEARING EN BANC IS NOT REQUIRED WHEN A PUBLISHED OPINION CONFLICTS WITH AN UNPUBLISHED DECISION

The State suggests that *United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992) requires en banc consideration because an unpublished disposition of this court, *Hiracheta v. Attorney General*, No. 03-16295 is in conflict with the result reached in this case. In *Hardesty*, the conflict was created by two published decisions. Here, the only Ninth Circuit opinion which has precedential value is the opinion in this case. There is no requirement for en banc consideration because there is no conflict in the precedent of this court.

III.

EN BANC CONSIDERATION IS NOT REQUIRED BECAUSE THE OPINION IN THIS CASE IS SOUNDLY BASED IN THE PRINCIPLES SET FORTH IN *SCHRIRO V. SUMMERLIN*

A. The *Summerlin* Decision

Under *Teague v. Lane*, 489 U.S. 288 (1989), a new rule of criminal procedure generally does not apply retroactively. However, retroactive effect may be given to a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, --- U.S.---, 124 S.Ct. 2519, 2523 (2004)(quoting *Teague*, 489 U.S. at 311). This Court has stated that retroactive application is available when the rule improves the accuracy of the trial and changes "our understanding of the 'bedrock procedural elements essential to the fairness of a proceeding. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 668-69 (9th Cir. 2002) (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)).

In arriving at its decision in *Bockting*, the majority found that, unlike the rule of *Ring v. Arizona*, 536 U.S. 584 (2002) (holding that aggravating factors in a death penalty case must be proved to a jury rather than to a judge), which was not given retroactive effect in *Summerlin*, 124 S.Ct. at 2525 (*Ring* not retroactive because the evidence was "simply too equivocal to support [the] conclusion" that judicial factfinding seriously diminished the accuracy of convictions), the rule of *Crawford* deserved retroactive effect because "the evidence that cross-examination seriously decreases the possibility of inaccurate conviction [was] unequivocal." *Bockting*, 399 F.3d at 1017. Thus, in arriving at its decision, the panel

viewed Crawford in light of *Summerlin* and correctly focused on the differences between the rights at issue in those cases and their respective impact on the accuracy of criminal convictions.

Viewing *Crawford* and *Summerlin* together was especially important because the majority opinions in both cases were authored by Justice Scalia within months of each other. The kind of rule that the *Summerlin* court would find to fit that narrow class of rules "without which the likelihood of an accurate conviction is seriously diminished" is precisely the kind of rule described in such detail in the *Crawford* opinion itself. As the *Bockting* opinion correctly noted, "[j]uxtaposed, *Summerlin* actually underscores why the *Crawford* rule implicates the "fundamental fairness and accuracy of the proceeding." *Bockting*, 399 F.3d at 1017. To further emphasize this point, it will be helpful to briefly review *Summerlin*.

In *Summerlin*, Justice Scalia, writing for the majority, held that *Ring v. Arizona*[1] did not apply retroactively to cases already final on direct review because it did not announce a watershed rule of criminal procedure. 124 S.Ct. at 2526. In reaching that conclusion, the Court stated that new rules of procedure generally do not apply retroactively unless they are "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. *Summerlin*, 124 S.Ct. 2523. In order to qualify as a "watershed" rule, the Court opined that the rule must be one

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[1] As previously mentioned, *Ring* required that aggravating factors for death penalty purposes be proved to a jury rather than a judge.

"without which the likelihood of an accurate conviction is seriously diminished." *Id.*

In determining whether *Ring* announced a"watershed" rule "without which the likelihood of an accurate conviction is seriously diminished," Justice Scalia framed the issue very carefully:

> The question here is not, however, whether the Framers believed that juries are more accurate fact finders than judges (perhaps so--they certainly thought juries were more independent. Nor is the question whether juries actually are more accurate fact finders than judges (again, perhaps so). Rather, **the question is whether judicial fact finding so "seriously diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct the law does not reach.**

Summerlin, 124 S.Ct. at 2525 (internal citations omitted; emphasis added). Thus, according to the *Summerlin* majority, the test for determining whether *Ring* constituted a "watershed" rule was whether the pre-*Ring* rule (which allowed for judges to find aggravating factors for death penalty purposes) was impermissibly inaccurate.

In applying that test, the *Summerlin* majority stated that the evidence was simply too equivocal to support the conclusion that the pre-*Ring* standard-- which allowed judges to find aggravating factors for death penalty purposes -- was impermissibly less accurate than the new *Ring* rule. According to the majority, the evidence showed that there was a continuous disagreement among many "presumably reasonable minds," over whether juries were better

factfinders than judges.[2] Because of the disagreements among so many "presumably reasonable minds," Justice Scalia stated that "we cannot confidently say that judicial factfinding seriously diminishes accuracy." *Id.* Thus, the *Summerlin* majority did not give *Ring* retroactive effect because it did not announce a rule "without which the likelihood of an accurate conviction [was] seriously diminished." *Id.* at 2523.

B. The Pre-*Crawford* Rule Was Unreliable, Unpredictable and Inaccurate

Determining *Crawford*'s retroactivity in light of *Summerlin* leaves little question that the *Bockting* Panel was correct and that en banc consideration is not necessary. *See Bockting*, 399 F.3d at 1016. In determining the retroactivity of *Crawford*, the issue should be framed in the same manner as the issue in *Summerlin*: whether the pre-*Crawford* rule of *Ohio v. Roberts*, 448 U.S. 56 (1980))[3] so "seriously

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[2] The evidence Justice Scalia was referring to included: 1) the fact that for every argument why juries were more accurate fact finders, there was another why they were less accurate; 2) members of the Court had previously opined that judicial sentencing may yield more consistent results because of judges' greater experience; and 3) the right to a jury trial has received a mixed reception in other countries throughout the world, suggesting it is implausible that judicial factfinding seriously diminishes the accuracy of the proceeding so as to produce an impermissibly large risk of injustice. *See Summerlin*, 124 S.Ct at 2525.

[3] Under *Roberts*, the Sixth Amendment's Confrontation Clause did not bar admission of an unavailable witness's statement against the accused if the statement "[bore] adequate indicia of reliability." 448 U.S. at 66, *abrogated by Crawford*, 541 U.S. 36. To meet the *Roberts* test, the evidence must have either fallen within a "firmly

diminishes accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." *Summerlin*, 124 S.Ct. at 2525.

The language of *Crawford* answers the question: *Roberts* was inherently unpredictable, inconsistent, and unreliable. The same cannot be said for *Ring v. Arizona*. *Ring* was not concerned with the jury-trial's effect on the reliability and accuracy of criminal convictions. Thus, it was not given retroactive effect in *Summerlin*. The issue in *Ring* was strictly constitutional; whether the Sixth Amendment required jury findings on the aggravating circumstances necessary to impose the death penalty. *Ring* itself emphasized that point. In response to Arizona's suggestion that judicial authority over the finding of aggravating factors "may ... be a better way to guarantee against the arbitrary imposition of the death penalty," the *Ring* majority quoted a portion of Justice Scalia's concurring opinion in *Apprendi v. New Jersey*, wherein he stated "[t]he Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders." *Ring*, 536 U.S. at 607 (quoting *Apprendi*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring)). The Court dispensed with Arizona's suggestion by recognizing that the jury-trial guarantee "has never been efficient, but it has always been free." *Id.* (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)). Thus, it is apparent that *Ring* was not concerned with the accuracy and reliability of the jury-trial guarantee. The tone and substance of *Crawford*, on the other hand, focused almost exclusively on

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rooted hearsay exception" or had "particularized guarantees of trustworthiness." *Id.*

the Confrontation Clause's effect on the reliability and accuracy of criminal convictions. In fact, in *Crawford*, Justice Scalia highlighted the Confrontation Clause's impact on the accuracy of criminal convictions by referring to the trial of Sir Walter Raleigh, who was convicted of treason and sentenced to death. *Crawford*, 541 U.S. at 44, 62. At his trial, Raleigh was denied the opportunity to confront his accuser, Lord Cobham, "with many of the arguments a court applying *Roberts* might invoke today." *Id.* at 62. One of Raleigh's trial judges later stated that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." *Id.* at 44. The Raleigh trial, and others like it, led to statutory and judicial reforms whereby English law developed a right of confrontation to limit these injustices. *Id.*

In *Crawford*, the Court used the injustices suffered by Raleigh to emphasize the negative impact *Roberts* had on criminal convictions. Under *Roberts*, Lord Cobham's accusations would have been admitted against Raleigh despite the fact that Raleigh was denied the right to cross-examine him and try to expose his accusation as a lie. *Id.* at 62. The "reliability framework" established in *Roberts* was referred to by the *Crawford* majority as being "so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations." *Crawford, v. Washington*, 541 U.S. 36, 63 (2004). The court described the *Roberts* "reliability" rule as "an amorphous, if not entirely subjective, concept...[w]hether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them." *Id.* The *Crawford* majority reinforced the unpredictability of *Roberts* by stating "the instant case is a self contained demonstration of *Roberts*' unpredictability and inconsistent application." *Id.* at 66.

To further cement the unpredictability and inconsistency of the *Roberts* framework, the *Crawford* majority showed how lower courts, in assessing the reliability of a given statement, often "wind up attaching the same significance to opposite facts." *Id.* at 63.[4] The Court went on to state that "the unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Crawford*, 541 U.S. at 63. As evidence of that fact, the Court cited a litany of cases where, under *Roberts*, courts routinely admitted accomplice confessions implicating the accused. *Id.* at 63-64 (explaining that even though the Court previously thought *Roberts* would bar accomplice confessions implicating the accused, courts routinely admit them). The Court also cited a study that found "appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases--more than one-third of the time. Id. at 64 (citing Kirst, Appellate Court Answers to the Confrontation Questions in *Lilly v. Virginia*, 53 Syracuse L.Rev. 87, 105 (2003)).

By going to great lengths to prove that the *Roberts* framework was unpredictable and inconsistent, Justice Scalia's majority opinion in *Crawford* established that the *Crawford* rule "implicated the fundamental fairness and accuracy of the criminal proceeding" in a way that the sentencing scheme in *Summerlin* did not. Because the

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[4] An example of this kind of analysis occurred in the trial of this case. A counselor secured by the District Attorney testified that the reason that the child, in numerous meetings with the counselor, denied that the sexual abuse by her father had occurred, was because she was a sexual abuse victim; no consideration was given to an alternative explanation: the child insisted to the counselor that Bockting had not abused her because he had not abused her.

purpose of the Confrontation Clause is to promote accuracy, the *Bockting* Panel considered the unequivocal evidence showing that "cross-examination seriously decreases the possibility of inaccurate convictions" and correctly decided to give *Crawford* retroactive effect. *Bockting*, 399 F.3d at 1017. That decision should not be disturbed by this Court. The Appellee's Petition should be denied.

C. *Crawford* Comfortably Falls Into The "Narrow Class of Rules"

The Appellee argues against giving retroactive effect to *Crawford* by mistakenly claiming that, under *Teague*, the class of rules deserving retroactive effect should be so exceedingly small that "new rules of procedure would almost never apply." Appellee's Petition at 12. In support of its position, the Appellee repeatedly cites to a statement in *Summerlin* where the Court stated that the "class of rules (deserving retroactive effect)is extremely narrow, and 'it is unlikely that any...has yet to emerge.'" 124 S.Ct. at 2523 (*quoting Tyler v. Cain*, 533 U.S. 656, 667 n.7 (2001)). Because the *Summerlin* decision was issued only three and a half months after *Crawford*, the Appellees' suggest that the statement from *Summerlin* is somehow instructive on the retroactivity of *Crawford*:

> [i]t is instructive to the issue at hand that this statement by the Supreme Court was included in the *Schriro* decision, handed down only three and a half months after the *Crawford* decision issued. In it, the Supreme Court announced that it was a virtual conclusion that no new procedural rules of the magnitude sufficient to qualify as exceptions to the non-retroactivity rule had yet been created — even after the issuance of the Crawford decision.

Petition at 13 (emphasis added). Not only is the Appellees' position flawed, but it misstates key words from *Summerlin*.

The *Summerlin* Court never stated, as the Appellee's claim, that a rule deserving retroactive status had "yet to be created." To the contrary, *Summerlin* specifically stated that it was unlikely that such a rule had "yet to emerge." 124 S.Ct. at 2523. There is a meaningful difference between "creating" a constitutional rule and having the rule "emerge" before the Supreme Court for retroactivity purposes. Thus, the fact that *Summerlin* stated that no such rule had "yet to emerge" does not, as Appellees purport, end the debate over whether *Crawford* applies retroactively.

The *Bockting* Panel considered the Appellee's argument and rejected it as follows:

> Admonitions such as in *Summerlin* offer discouragement but no guidance. Because our job is not to conjure up hidden meaning [as Appellees now request] we simply heed the warning and our analysis thus adheres faithfully to the holding and rationale of *Summerlin*.

Bockting, 399 F.3d at 1016.

The opinion in this case relied upon the reasoning and analysis in *Summerlin* to support its conclusion that *Crawford* should be given retroactive effect: "[j]uxtaposed, *Summerlin* actually underscores why the *Crawford* rule implicates the "fundamental fairness and accuracy of the criminal proceeding..." *Bockting*, 399 F.3d at 1016. Although *Teague* and its progeny set a strong presumption in favor of

nonretroactivity, the bar is not absolute.[5] *Crawford*'s cross-examination requirement meets the Supreme Court's retroactivity criteria.

Unlike other cases involving important constitutional rights, including *Ring*, *Crawford*'s impact on the accuracy of criminal proceedings is unequivocal. If *Crawford* does not fit within the class of retroactive procedural rules, it would be hard to conjure up a rule that would. En Banc consideration is not necessary to reach that conclusion.

IV.

UNDER ANY STANDARD, THE ERRONEOUS ADMISSION OF THE CHILD'S STATEMENTS TO THE DETECTIVE CANNOT BE CONSIDERED HARMLESS.

The only evidence which connects Mr. Bockting to sexual molestation of Autumn Bockting was the hearsay statements of Autumn introduced through the police officer and her mother. There was no DNA; there was no confession; the mother did not testify that she had seen anything occurring. At the Preliminary Hearing and to the prosecutor-selected counselor, the child denied that the events happened.

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[5] The State cites to both pre- and post-*Teague* cases for examples of rules which have not been applied retroactively. The State does not mention that rules affecting a criminal defendant's rights to confrontation of witnesses have repeatedly been held to apply retroactively prior to the enactment of AEDPA and the decision in *Teague*. *See Berger v. California*, 393 U.S. 314 (1969); *Roberts v. Russell*, 392 U.S. 293 (1968); *Schneble v. Florida*, 405 U.S. 427 (1972).

Even if the child's statements to her mother were admissible, the admission of the testimony of the detective cannot be deemed harmless under either a "harmless beyond a reasonable doubt" standard, *Neder v. United States*, 527 U.S. 1 (1999) or a "substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*, 507 U.S. 619 (1993). The panel held,

> The detective's testimony regarding Autumn's interview was a critical piece of evidence, particularly in view of Autumn's inconsistent testimony at the preliminary hearing. Even if her statement to the mother was, for argument's sake, considered admissible, the detective's description of Autumn's interview was so significant that the error could have materially affected the verdict.

Opinion at 399 F.3d 1022.

Laura Bockting's credibility was at issue due to the rocky relationship between the couple, the fact that she waited over two days to take the child to the hospital, her testimony that immediately after she said she was told about the molestation, she left the child alone with Appellant, and her background as an alcohol and drug abuser. See Statement of Facts in Opening Brief. The hearsay statements introduced through the police officer were critical to the prosecutor's case in order to corroborate Laura Bockting. En banc consideration is not required to determine that the critical nature of this testimony had substantial influence in determining the jury's verdict.

V.

CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately spaced 14-point. The total number of words is 3,589.

Respectfully submitted,

/s/
FRANNY A. FORSMAN
Federal Public Defender

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-15866

[Filed June 1, 2005]

MARVIN HOWARD BOCKTING, Petitioner-Appellant,	)
v.	)
ROBERT BAYER, Respondent-Appellee.	)

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, District Judge, Presiding
D.C. No. CV-98-00764-ECR

Before: J. Clifford Wallace, John T. Noonan, and M. Margaret McKeown, Circuit Judges

ORDER

The opinion filed February 22, 2005, slip op. 1991, and appearing at 399 F.3d 1010 (9th Cir. 2005), is amended as follows:

At 399 F.3d 1022, slip op. 2012, strike the last paragraph of Part II. Substitute the following paragraph:

> The final question is whether admission of Autumn's statement "had substantial and injurious effect or

> influence in determining the jury's verdict." *See Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The detective's testimony regarding Autumn's interview was a critical piece of evidence, particularly in view of Autumn's inconsistent testimony at the preliminary hearing, and weaknesses in Laura Bockting's testimony. Even if Autumn's statement to the mother was, for argument's sake, considered admissible, the detective's description of Autumn's interview was so significant as corroborating evidence that its admission had a substantial and injurious effect or influence in determining the jury's verdict. Thus, the admission of Autumn's statement requires reversal.

The petition for panel rehearing is DENIED. The petition for rehearing en banc is pending before the Court. No further petitions may be filed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-15866

[Filed August 11, 2005]

MARVIN HOWARD BOCKTING,)
Petitioner-Appellant,)
)
v.)
)
ROBERT BAYER,)
Respondent-Appellee.)
)

Before: J. Clifford Wallace, John T. Noonan, and M. Margaret McKeown, Circuit Judges

ORDER

Judge McKeown votes to deny the petition for rehearing en banc, and Judge Noonan so recommends. Judge Wallace recommends granting the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc, but the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc rehearing.

The petition for rehearing en banc is **DENIED.**

DISSENT

O'SCANNLAIN, Circuit Judge, with whom KOZINSKI, KLEINFELD, GRABER, GOULD, TALLMAN, BYBEE, CALLAHAN, and BEA, Circuit Judges, join, dissenting from denial of rehearing en banc.

Judge Wallace's dissent ably explains why the court errs in holding that the new rule established in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 158 L. Ed. 2d 177 (2004), applies retroactively. *See Bockting v. Bayer*, 399 F.3d 1010, 1024 (9th Cir. Feb. 22, 2005) (Wallace, J., concurring in part and dissenting in part). I write only to add a few additional reasons why I believe the majority's holding--which conflicts with the conclusion of all five other circuits to have reached the issue, *see infra* at 10406-07--is in serious tension with the retroactivity jurisprudence of the Supreme Court as well as our own court. With respect, I believe that we have erred in failing to rehear this case en banc.

I

A

The last time the Supreme Court had occasion to reverse this circuit's holding that a new rule of criminal procedure applied retroactively, it instructed us as follows: "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is *seriously* diminished." *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 2523, 159 L. Ed. 2d 442 (2004) (internal quotation marks, brackets, and citation omitted). It seems to me that the majority ignores the emphasis that the Court itself placed on the word "seriously." Almost any new rule will work to a criminal defendant's advantage in some circumstances. The question, though, is

whether *Crawford*'s new rule is of the magnitude of the one ruling that the Court has told us *would* apply retroactively--namely, the one articulated in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), that a defendant has the right to be represented by counsel.

Yet *Crawford* hardly bears comparison with *Gideon*. To deny a criminal defendant charged with a serious crime the benefit of counsel is to put him awash in a sea of doctrines, deadlines, and technicalities, in which his ability to defend his own interest is highly unlikely to survive. While we value individual autonomy enough to permit defendants to represent themselves when they so insist, *see Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), we do so knowing that such autonomy comes at a serious cost to our confidence in the ultimate verdict. *Id.* at 833. It is thus reasonable to say that, without counsel, "the likelihood of an accurate conviction is *seriously* diminished."

The *Crawford* rule simply does not approach this magnitude. It did not establish *ex nihilo* the right to confrontation, as *Gideon* established the right to counsel; it merely reshaped the contours of that right. The difference between the pre-*Crawford* regime of *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), in which out-of-court statements not subject to cross-examination were admissible if they bore adequate indicia of reliability, and the new regime in which they are *per se* inadmissible, is small in comparison to the difference between giving a defendant competent counsel and giving him none at all. *Cf. Sawyer v. Smith*, 497 U.S. 227, 244, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) ("But given that [the rule of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231

(1985),[1]] was added to an existing guarantee of due process protection against fundamental unfairness, we cannot say this systemic rule enhancing reliability is an 'absolute prerequisite to fundamental fairness' of the type that may come within *Teague*'s second exception." (citation omitted)). It is thus apparent that the "narrow right . . . that [Crawford] affords to defendants in a limited class of . . . cases . . . possesses little of the 'watershed' character envisioned by *Teague*'s second exception." *O'Dell v. Netherland*, 521 U.S. 151, 167, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997).

B

Indeed, *Crawford*'s rule does less to decrease the chance of an inaccurate conviction than many rules that have been held *not* to apply retroactively. Most recently, in *Schardt v. Payne*, ___ F.3d ___, 2005 U.S. App. LEXIS 13569 (9th Cir. 2005), we refused to give retroactive effect to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), which invalidated state sentencing guidelines that increased a defendant's sentence based on facts found by a judge by a mere preponderance of the evidence. *Id.* at 2537-38. The application of a mere *preponderance* standard instead of the reasonable-doubt standard required by *Blakely* surely increases the likelihood of inaccurate criminal punishment more than the admission of evidence under the *Roberts* test

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[1] *Caldwell* held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29.

did.[2] *Cf. Ivan V. v. City of New York*, 407 U.S. 203, 204, 92 S. Ct. 1951, 32 L. Ed. 2d 659 (1972) (per curiam) ("[T]he reasonable-doubt standard is a prime instrument for reducing the risk of convictions resting on factual error." (quoting *In re Winship*, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); *id.* at 205 ("[T]he major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect."). If even the standard-of-proof aspect of *Blakely* does not satisfy the *Teague* test, I do not see how *Crawford* can do so.

C

Also instructive is *Gilmore v. Taylor*, 508 U.S. 333, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993), in which the Supreme Court considered the retroactivity of the Seventh Circuit's

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[2] Of course, *Blakely* relates to the accuracy of sentences, not underlying convictions. *See United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir. 2002) (relying, in part, on that difference in holding *Apprendi* not to apply retroactively). I do not see how the difference can be material, though, when the point of *Blakely* and the entire line of jurisprudence stemming from *Apprendi* is precisely that sentencing factors must be treated as elements of a crime when they increase the defendant's maxi-mum sentence. Moreover, the Supreme Court has not distinguished between sentences and convictions when applying *Teague*; rather, it has implied that a watershed rule could be retroactive under *Teague* if it "seriously diminished the likelihood of obtaining an accurate determination in [a] sentencing proceeding." *Graham v. Collins*, 506 U.S. 461, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) (first alteration in original) (internal quotation marks omitted).

holding that certain jury instructions in Illinois violated due process because they "allowed the jury to return a verdict of murder even if the jury made findings that should have resulted in a verdict of voluntary manslaughter," *Falconer v. Lane*, 905 F.2d 1129, 1130 (7th Cir. 1990). Under the challenged instructions, the Seventh Circuit had noted, "no matter how clearly either the State or the defense proved the existence of the mitigating 'manslaughter defenses,' the jury could nevertheless return a murder verdict." *Id.* at 1136. Applying *Teague*, the Supreme Court noted that "the *Falconer* court expressed concern that the jury might have been confused by the instructions in question," but nevertheless refused to apply the rule retroactively because it did not "fall[] into that small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Gilmore*, 508 U.S. at 345 (quoting *Graham v. Collins*, 506 U.S. 461, 478, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993)).

Thus even a rule forbidding a jury instruction that concededly permits the jury to convict the defendant of a crime he did not commit is insufficiently fundamental and accuracy-enhancing to warrant retroactive application under *Teague*. Again, the *Bockting* majority's holding is in serious tension with that of the Supreme Court. The only evidence admissible before *Crawford* but now excluded consists of out-of-court testimonial statements that trial and appellate courts have explicitly found to bear adequate indicia of reliability. It is difficult to see how the introduction of such evidence could be more likely to lead to the conviction of an innocent defendant than a set of jury instructions that significantly misdefine the substance of the crime.

D

The *Bockting* majority points out, of course, that the *Craw-ford* Court severely criticized the 'indicia of reliability' test that held sway under *Roberts*. And so it did. *See Crawford*, 541 U.S. at 62-65. The Court's criticism, however, is primarily of the test's doctrinal unmanageability, *see id.* at 63 (criticizing the *Roberts* test as "unpredictable" and "amorphous"), and its incompatibility with the Framers' intentions, *see id.* ("The unpardonable vice of the *Roberts* test [is] its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."); *id.* at 65 (conceding that "most of the usual safeguards of the adversary process attend the [admitted out-of-court] statement" but noting that "the single safeguard missing is the one the Confrontation Clause demands.") Neither of those criticisms goes directly to the crucial question, which is whether "the likelihood of an accurate conviction is *seriously* diminished" when evidence is admitted under the *Roberts* test.

The test may have been unpredictable *at the margins*, as almost any balancing test will be to one degree or another, but nothing in the *Crawford* opinion suggests that trial and appellate judges were likely to admit clearly unreliable evidence in anything but the exceptional case. Indeed, the Court stated that the vagueness of the *Roberts* test "might be a small concern in run-of-the-mill . . . prosecutions," even if it could leave defendants unprotected in "great state trials" in "politically charged cases like [Sir Walter] Raleigh's." *Id.* at 68.

Nor, of course, can the Court's emphasis on the stark incompatibility between the *Roberts* test and the Framers' understanding of the Confrontation Clause be taken to imply

that the *Roberts* test dramatically increases the likelihood of an inaccurate conviction. "That the Framers made a particular judgment about the best way to ensure the reliability of testimony does not mean that any rule other than the one they envisioned creates an impermissibly high risk of inaccurate conviction." *Bockting*, 399 F.3d at 1029 (Wallace, J., concurring in part and dissenting in part); *cf. Crawford*, 541 U.S. at 61 ("[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner.").

E

In that respect and others, *Crawford*'s rule resembles nothing so much as the *last* new rule we held to apply retroactively, only to be quickly reversed by the Supreme Court. In *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), we gave retroactive application to the Court's holding in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), that juries and not judges must determine the existence of any aggravating factor necessary for imposition of the death penalty. *See Summerlin*, 341 F.3d at 1108-21. In *Ring*, the Court had emphasized that "the guarantees of jury trial in the [Constitution] reflect a profound judgment about the way in which law should be enforced and justice administered." 536 U.S. at 609 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)). The Court had thus held that the Constitution reflects the Founders' insistence that the fairness and accuracy of criminal prosecutions (and imposition of the death penalty) are best guaranteed by giving the defendant the ability to insist that relevant facts be decided by a jury. *See id.*; *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (noting that jury factfinding is

necessary "to guard against a spirit of oppression and tyranny on the part of rulers.").

Nevertheless, when we held that *Ring* applied retroactively because it was a watershed decision of criminal procedure without which the fairness and accuracy of a death sentence were seriously diminished, *see Summerlin*, 341 F.3d at 1108-21, the Supreme Court quickly reversed us. *See Summerlin*, 124 S. Ct. at 2524-26. Even though the Constitution demands factfinding by juries--and even though juries *may*, in fact, be more accurate factfinders than judges--the Court held that there is not sufficient evidence to demonstrate that "judicial factfinding so *seriously* diminishes accuracy that there is an impermissibly large risk of punishing conduct that the law does not reach." *Id.* at 2525 (internal quotation marks and brackets omitted).

A parallel principle governs this case: even though the Confrontation Clause demands the exclusion of out-of-court testimony--and even though blanket exclusion of such testimony may, in fact, be more accurate than the more nuanced rule of *Roberts*--there is little reason to think that judicial determination of reliability so seriously diminishes accuracy as to make likely the conviction of the innocent. If *Apprendi*, *Ring*, and *Blakely*, with their massive implications striking to the core of our system of criminal justice, were not watershed rules with retrospective application, then surely the *relatively* minor--though still quite significant--change wrought by *Crawford* is not either.[3]

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[3] The Seventh and Tenth Circuits have each argued that the watershed status of the *Crawford* rule is further belied by the fact that violations of the Confrontation Clause are subject to harmless-error review and thus are not structural error on par with the denial of counsel. *See Brown v. Uphoff*, 381 F.3d 1219 at 1226-27;

II

And such has been precisely the conclusion of every other circuit to have considered the question. *See Mungo v. Duncan*, 393 F.3d 327, 336 (2d Cir. 2004); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. Feb. 23, 2005); *Murillo v. Frank*, 402 F.3d 786, 790 (7th Cir. Apr. 1, 2005); *Bintz v. Bertrand*, 403 F.3d 859, 867 (7th Cir. Apr. 7, 2005); *Brown v. Uphoff*, 381 F.3d 1219, 1227 (10th Cir. 2004); *see also Evans v. Luebbers*, 371 F.3d 438, 444-45 (8th Cir. 2004) (strongly suggesting that *Crawford* does not apply retroactively). It was the conclusion reached by Judge Wallace in his convincing dissent. *See Bockting*, 399 F.3d at 1024 (Wallace, J., concurring in part and dissenting in part). It was the unanimous conclusion of three judges of this court in an earlier, unpublished disposition. *See Hiracheta v. Att'y*

Murillo v. Frank, 402 F.3d 786 at 791. The *Bockting* majority rejects this reasoning, arguing that even non-structural constitutional rules can constitute watershed, bedrock rules of procedure. *See Bockting*, 399 F.3d at 1020. Whether or not the majority is correct, though, its holding flatly contradicts our holding and reasoning in *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002), which held that *Apprendi* did not apply retroactively on collateral review. The *Sanchez-Cervantes* panel concluded that "by applying harmless error analysis . . . to *Apprendi* claims, we have necessarily held that *Apprendi* errors do not render a trial fundamentally unfair. Therefore, it would seem illogical to hold that such an error is a watershed rule." *Id.* at 670. The *Bockting* majority does not even cite *Sanchez-Cervantes*, and--whether or not the rationale in that case was correct--the conflict between the two opinions provides another reason to rehear *Bockting* en banc.

Gen'l, 105 Fed. Appx. 937, 938 (9th Cir. 2004) (unpublished memorandum disposition).[4]

Even the Supreme Court itself has indirectly suggested that the *Crawford* rule is not retroactive. In its opinion in *Summerlin*--issued well *after Crawford* and written by Justice Scalia, who also authored the opinion in *Crawford*--the Court stated that the class of retroactively applicable rules "is extremely narrow, and it is unlikely that *any* has yet to emerge." *Summerlin*, 124 S. Ct. at 2523 (internal quotation marks, ellipsis, and brackets omitted) (emphasis added) (quoting *Tyler v. Cain*, 533 U.S. 656, 667 n.7, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001)). The *Bockting* majority argues that this pronouncement from the Court "offer[s] discouragement but no guidance." *Bockting*, 399 F.3d at 1016. But we treat even Supreme Court dicta with "due deference," *United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996), and the Court's statement suggests that our holding that *Crawford* applies retroactively is likely to meet the same fate as our similar holding in *Summerlin* with regard to *Ring*--namely, speedy reversal.

The two-judge *Bockting* majority thus stands alone in its conviction that *Crawford* applies retroactively. Its holding will have serious consequences: it will open the door for a slew of habeas petitions (and, for federal prisoners, motions under 28 U.S.C. § 2255) from prisoners whose convictions were based, even partially, on out-of-court testimonial statements. Concerns about taxing the state and federal governments'

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[4] I cite *Hiracheta* not as precedent, of course, but because a conflict with a previously issued memorandum disposition is a factor weighing in favor of rehearing en banc. *See* Ninth Circuit Rule 36-3(b)(iii).

resources to retry convicted criminals should not prevent us from granting writs of habeas corpus when the Constitution requires it. But those concerns certainly counsel us to consider very carefully any precedent that will lead to the granting of an unknowable--but likely large--number of such writs. *See Beard v. Banks*, 542 U.S. 406, 124 S. Ct. 2504, 2511, 159 L. Ed. 2d 494 ("In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." (quoting *Teague v. Lane*, 489 U.S. 288 at 310, 109 S. Ct. 1060, 103 L. Ed. 2d 334) (citations omitted)).

III

Because *Bockting* conflicts with the decision of every other circuit to have considered the retroactivity of *Crawford*; because it conflicts with our own decision in *Hiracheta*; and, most of all, because it was wrongly decided, I respectfully dissent from our order denying rehearing en banc.